

(21,235.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 439.

ROBERT A. HOOE AND ARTHUR HERBERT,
APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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I.—*Petition.*

In the Court of Claims.

No. 28238.

ROBERT A. HOOE and ARTHUR HERBERT

vs.

THE UNITED STATES.

Petition.

Filed August 1st, 1905.

To the Honorable the Chief Justice and the Judges of the Court of Claims:

Your petitioners, Robert A. Hooe and Arthur Herbert, respectfully show:

I.

That they are both residents and citizens of the United States.

II.

2 That they are owners of real estate in Square 406, in the City of Washington, District of Columbia, fronting 50 feet on E street, and 87½ feet on 8th street N. W., together with the building thereon, and that such building contains 20,173 5-12 square feet of floor space, which includes the floor space of the basement of the building, amounting to 2,039¾ square feet. The building was erected on the real estate aforesaid by the then owners thereof, under an agreement in writing, made and entered into March 16, 1882, by and between the then owners of the property and the United States represented by the Postmaster-General. From the time of the completion of the building, on or about October 1, 1882, the building, including the basement, was continuously occupied by the United States, for Post Office Department purposes, until November, 1899, the United States paying therefor as rental \$8,000 per annum, payable quarterly at the end of each quarter.

III.

On the 10th of July, 1900, the petitioners leased and rented to the United States, for the use of the Civil Service Commission, all of the building and premises above described, excepting the basement thereof, together with all and singular the appurtenances whatsoever to the said building and premises belonging and in anywise appertaining, for the period commencing on the first day of August, 1900, and ending with the end of that fiscal year, June 30, 1901, at the rate of \$333.33½ per month, to be paid on the last day of each and

every month. That leasing was at the rate of \$4,000 per annum, which amount was accepted by the petitioners partially because it was the amount appropriated by Congress for the rent of offices for the Civil Service Commission for that fiscal year, 31 Stat., 125, but principally because it was at the time understood by and between the petitioners and the officers of the United States that the latter would recommend that the amount of the rental of the property should be increased to \$6,000 per year, that being the fair and just value of the use of the entire premises.

The Civil Service Commission took possession of the building, and also of the basement, August 1, 1900, and has continued in the entire and exclusive possession of the building and the basement until this time. The amount appropriated for the rent of the offices for the Civil Service Commission for the fiscal year ending June, 30, 1902, was \$4,000, 31 Stat., 1001, and for the following fiscal year it was the same amount, 32 Stat., 162.

IV.

The Civil Service Commission continued in the use and occupation of the building and basement hereinbefore described, and on the 18th day of August, 1903, the United States entered into an agreement or lease with the petitioners for the use of all of the building and premises, excepting the basement thereof, by the Civil Service Commission for one year, commencing on the first day of July, 1903, at the rate of \$4,500 per annum, payable monthly on the last day of each and every month. The petitioners accepted the lease for that amount, partially because Congress had only appropriated \$4,500 for the rent of offices for the Civil Service Commission in that fiscal year, 32 Stat., 897, and partially because it was understood and agreed with the petitioners by the officers representing the United States that they would recommend that the amount of such rental should be increased to \$6,000 per annum. At the second session of the 57th Congress, the Secretary of the Interior submitted an estimate for \$6,000 for the annual rent of the building aforesaid for use of the Civil Service Commission, Doc. No. 12, 2d Sess., 57th Cong., but Congress failed to appropriate more than \$4,500, for such purpose. See also 33 Stat., Part 1, 129, 674. The contracts heretofore named will be introduced in evidence and are made parts hereof by this reference thereto.

V.

Although the petitioners had not rented the basement in the premises aforesaid to the United States for the use of the Civil Service Commission, and although the Congress of the United States had failed to approve the recommendations made by its officers, pursuant to the agreement with the petitioners, that the amount of the rental to be paid them should be increased by law to \$6,000 per annum, yet the United States, through the Civil Service Commission, took possession of the basement in the premises aforesaid, and from the first day of August, 1900, until this time has continued to use and occupy the same as well as said building, to the great dam-

age of the petitioners, and to the great benefit of the United States, because such basement not only contains the available floor space herein named, but it also contains all the machinery for running the elevator in the building as well as for furnishing steam for the heating thereof and for supplying water to the building. Such use of the basement by the United States was in fact highly essential if not absolutely necessary to the perfect enjoyment of the rooms in the building lying above the basement. Such use and occupation of the basement was and is of the reasonable value of, to wit: \$1,500 per annum, when used in connection with the remainder of the building.

VI.

Petitioners have received under protest all payments made to them, and have repeatedly complained to the United States, through various officers of the Department of the Interior, because they were not receiving the amount of rental justly due them for the
 5 use of all the property aforesaid, and such officials have in no sense disagreed with the statements and complaints made by the petitioners, but, on the contrary, have said that the petitioners ought to have and receive a rental of \$6,000 per annum for the use of all the property, and they have repeatedly promised to do all in their power to prevail on Congress to make the necessary appropriation in that amount. Petitioners believe that the officers of the Department of the Interior have acted in entire good faith with them in this behalf, and have endeavored to secure such appropriations, but without success. Petitioners aver that, by reason of the premises, they have been damaged in the sum of \$9,000, to wit:

Rent of the premises occupied, from August 1, 1900,	
to August 1, 1905, at its fair and reasonable value,	
\$6,000 per annum,.....	\$30,000 00
Less amount actually received by them for that period,	21,000 00
Amount now due,.....	\$9,000 00

VII.

Your petitioners are the sole owners of the claim sued on, and no other person or corporation is interested therein; no assignment or transfer of the claim, or any part thereof, or interest therein, has been made.

VIII.

Your petitioners are justly entitled to the amount herein claimed from the United States, as they believe, after allowing all just credits and set-offs, and they believe that the facts are correctly stated in this petition.

Wherefore your petitioners pray judgment against the United States for \$9,000.

DUDLEY & MICHENER,
Attorneys of Record.

6 DISTRICT OF COLUMBIA, ss:

Personally appeared before me, a notary public in and for the District of Columbia, Robert A. Hooe and Arthur Herbert, who, being duly sworn according to law, depose and say that they are the petitioners herein; that they have read and understand the foregoing petition, and that the matters and facts therein stated are true as they are informed and believed.

R. A. HOOE.
ARTHUR HERBERT.

Subscribed and sworn to before me this first day of August, 1905.

L. P. SQUIER,
Notary Public.

7

II.—*Traverse.*

In the Court of Claims of the United States, December Term, A. D. 1907.

No. 28238.

HOOE & HERBERT
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney General.

8

III.—*Argument and Submission.*

On the 5th day of February, A. D., 1908, this case was argued by Mr. L. T. Michener, for the claimants, and by Mr. C. F. Kinche-
loe, for the defendants, and the case was thereupon submitted.

On the 9th day of March, 1908, the Court filed findings of fact, conclusion of law, and opinion, dismissing the petition.

Both the claimants and the defendants filed motions to amend these findings, of which the following are copies.

9

IV.—*Claimants' Motion to Amend Findings.*

Filed April 23, 1908.

Claimants move the court to make the following amendments of the findings of fact:

1. Amend Finding III by adding to the fourth sentence these words: "for the entire building, including the basement."

2. Also amend that finding by striking the word "informed" out of the seventh sentence, and inserting the word "wrote" in lieu thereof.

3. Amend Finding IV by inserting in the second sentence, after the word "into", the following words: "negotiations with claimants by correspondence for the rent of all the building and premises for the use of the Civil Service Commission, but claimant refused to rent all the building and premises for \$4,500 per annum, and he finally made".

4. Amend Finding V by inserting at the end of the first sentence the words: "all with the knowledge of the Secretary of the Interior."

10 5. Amend that finding by striking out of the last sentence the figures "500" and inserting the figures "1,000" in lieu thereof.

6. Amend Finding VI by adding this sentence at the end thereof: "The fair rental value of the whole property during its occupancy by the Civil Service Commission was \$8,000 per annum, but the claimants never demanded more than \$6,000 per annum during the occupancy aforesaid."

11 V.—*Defendants' Motion to Amend Findings.*

Filed May 18, 1908.

Come now the defendants, by their Attorney General, and alleging error of fact upon the part of the court in the findings of fact filed herein on March 9, 1908, move the court to amend said findings as follows:

1. In Finding III, amend the first sentence of the third paragraph of the finding to read as follows:

March 3, 1901, Congress appropriated \$4,000, for rent for quarters for the Civil Service Commission for the fiscal year ending June 30, 1902, and shortly after the beginning of that fiscal year the Secretary of the Interior wrote to the claimants proposing a renewal of said lease for that year, in response to which the claimants wrote the Secretary of the Interior, "we are unwilling to bind ourselves to rent the said building for another year at the rate of \$4,000 per annum", and further stated that they could not, with justice to themselves, rent the entire building, including the basement, then occupied by the commission, at a rental of less than \$6,000 per annum.

2. In Finding IV, amend the last sentence of the second paragraph of said finding to read as follows:

The claimants took no action in response to said proposal further than to write the Secretary of the Interior requesting that the basement of the building, which had not been included in either of the leases to the Government, be included in the lease at the rate of 30 cents per square foot for its floor space.

12 3. Amend the last sentence of Finding V to state that the fair rental value of that portion of the basement in question was \$300 per year.

13 VI.—*Argument and Submission of Motions to Amend Findings.*

On the 20th day of May, 1908, the motions of the claimants and defendants to amend the findings of fact, filed March 9, 1908, were argued by Mr. L. T. Michener, for the claimants, and by Mr. C. F. Kincheloe, for the defendants, and the motions were thereupon submitted.

VII.—*Order of Court on Motions to Amend Findings.*

Filed May 25, 1908.

Order.

It is ordered that the defendants' motion filed herein May 18, 1908, to amend the findings of fact filed March 9, 1908, be allowed in part and overruled in part.

It is further ordered that the claimants' motion filed April 23, 1908, to amend the findings of fact filed March 9, 1908, be allowed in part and overruled in part.

The former findings are vacated and set aside and amended findings are this day filed in lieu thereof *nunc pro tunc* as of March 9, 1908. The judgment and opinion to stand.

BY THE COURT.

14 VIII.—*Findings of Fact (as Amended), Conclusion of Law, and Opinion of the Court.*

Court of Claims of the United States.

No. 28238.

(Decided March 9, 1908.)

ROBERT A. HOOE and ARTHUR HERBERT

v.

THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimants are residents and citizens of the United States.

II.

The claimants now are and at all the times hereinafter mentioned were the owners of real estate in the city of Washington, D. C., situ-

ated on the northwest corner of Eighth and E streets NW., fronting 50 feet on E street and $87\frac{1}{2}$ feet on Eighth street, together with the building thereon; such building containing 20,173 $\frac{5}{12}$ square feet of floor spaces, which includes $2,039\frac{3}{4}$ square feet of floor space in the basement thereof, not occupied by heating and elevator plants and equipment for the building.

III.

July 10, 1900, the Secretary of the Interior, under authority of the act of Congress making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June 30, 1901, entered into a written contract with the claimants, whereby the claimants leased and rented to the United States Government for the use of the Civil Service Commission the building and premises above described, except the basement thereof, together with all and singular the appurtenances whatsoever to the said building and premises belonging and in any wise appertaining, for the period commencing the 1st day of August, 1900, and ending June 30, 1901, at the rate of \$333.33 $\frac{1}{3}$ per month, the right being reserved to the Government to terminate the lease after thirty days' notice in writing at the end of each calendar month.

August 1, 1900, the Civil Service Commission took possession of the entire building, including the basement, and has continued in exclusive possession thereof until the bringing of this action.

15 August 1, 1905. The amount appropriated by Congress for the rent of offices for the Civil Service Commission for the fiscal year ending June 30, 1901, was \$4,000, one-twelfth of which was expended as rent for offices for said Commission for the month of July, 1900.

March 3, 1901, Congress appropriated \$4,000 for rent for quarters for the Civil Service Commission for the fiscal year ending June 30, 1902, and shortly after the beginning of that fiscal year the Secretary of the Interior wrote to the claimants proposing a renewal of said lease for that year, in response to which the claimants wrote the Secretary of the Interior, "We are unwilling to bind ourselves to rent the said building for another year at the rate of \$4,000 per annum," and further stated that they could not, with justice to themselves, rent the entire building, including the basement, then occupied by the Commission, at a rental of less than \$6,000 per annum. No further action was taken in the matter of the renewal of the lease by either party for the fiscal year ending June 30, 1902, and the defendants continued in possession of said building and basement during said year and paid to the claimants the rate specified in the lease for the first year, to wit, \$4,000. In his estimates for the appropriations for the fiscal year ending June 30, 1903, the Secretary of the Interior submitted to Congress an estimate for an increase to \$6,000 for rent of quarters for the Civil Service Commission. This sum, however, not being included in the legislative, executive, and judicial bill for that fiscal year as passed by the House, thereupon the agent of the claimants wrote the chief clerk of the Department of the Interior that unless this estimate of \$6,000 was restored

by the Senate he was instructed by the claimants to ask for possession of said property at the earliest convenient time. The Senate was also informed of this conclusion of the claimants. This agent also appeared before the Committee on Appropriations of the House of Representatives in behalf of the claimants, and stated that the claimants would demand possession of the building unless an appropriation of \$6,000 was made for rental of the entire building, and the Secretary of the Interior transmitted to the chairman of the Senate Committee on Appropriations the letter from the agent of the claimants containing the statement that the possession of said building would be demanded unless said increase was made.

Congress, however, refused to increase the appropriation and appropriated for the fiscal year ending June 30, 1903, the sum of \$4,000 for rent for quarters for the Civil Service Commission, the same as in preceding years. No further action was taken on the part of either party relative to the increase of rent or demanding possession, and the defendants continued in possession of said property, including the basement, for that fiscal year, paying rent therefor at the rate of \$4,000 per year.

IV.

In the estimates for appropriations for the fiscal year ending June 30, 1904, the Secretary of the Interior renewed his estimate for an increase of \$2,000 for rent of quarters for the Civil Service Commission, and which appropriation for that fiscal year was increased by Congress to \$4,500. In consequence of this increase in the appropriation the Secretary of the Interior entered into negotiations with claimants by correspondence for the rent of all the building and premises for the use of the Civil Service Commission for the \$4,500 appropriated, but claimants refused to rent all the building and premises for \$4,500 per annum, and he finally made a lease with the claimants August 18, 1903, for all of said building except the basement for the fiscal year ending June 30, 1904, at the rate of \$4,500 per year, the other provisions of the lease being the same as those of the lease hereinbefore referred to.

May 18, 1904, Congress appropriated the sum of \$4,500 for rent for quarters for the Civil Service Commission for the fiscal year ending June 30, 1905, and on November 15, 1904, the Secretary of the Interior made a proposal by letter to the claimants for a renewal of the lease of August 18, 1903, for the fiscal year ending June 30, 1905, at the rate of \$4,500 per annum, in accordance with said appropriation. The claimants took no action in response to said proposal further than to write the Secretary of the Interior requesting that the basement of the building, which had not been included in either of the leases to the Government, be included in the lease at the rate of 30 cents per square foot for its floor space.

No further action was taken by either party with reference to the renewal of the lease or increase of rental for the fiscal year ending June 30, 1905, and the claimants were paid rent for that year at the rate of \$4,500, as provided by the appropriation and specified in the lease for the preceding year.

The appropriation by Congress for rent of quarters for the Civil

Service Commission for the fiscal year ending June 30, 1906, was also the sum of \$4,500, and the Commission, without any express renewal of the lease for this fiscal year, continued in occupation of the entire building, including the basement, up to August 1, 1905, for which the claimants have been paid at the rate of \$4,500 per year.

V.

Although the claimants never rented to the Government for the use of the Civil Service Commission, or for any other purpose, that part of the basement of said building not occupied by heating and ventilating plants and equipment thereof, yet the Civil Service Commission took possession of this portion of said basement and continuously occupied and used the same from the 1st day of August, 1900, until the bringing of this action, August 1, 1905; and in a letter to the Acting Secretary of the Interior dated November 28, 1904, relative to the matter of a renewal of the Government's lease for the building for that fiscal year, the claimants, among other things, called attention to the fact that the basement of the building was then fully occupied by the Civil Service Commission. The fair rental value of that portion of the basement occupied and used as aforesaid was \$400 per year; and the rental value of the entire building, including the basement, was not less than \$6,000 per year.

VI.

During the time that the defendants have occupied and used said building and basement belonging to the claimants, the claimants have receipted for rent for the same in full, except for the basement, which has been especially excluded from each of
17 said receipts given by the claimants. With the exception of this exclusion of the basement from said receipts, it does not appear that any other protest was ever made by the claimants that said payments were not in full for the rent legally due to them for said building. The claimants, however, repeatedly insisted that the defendants were not paying enough rent for said building, and on one occasion asked for extra rent for said basement, as heretofore found.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the petition be dismissed and judgment entered for the defendants.

Opinion.

BARNEY, J., delivered the opinion of the court:

This is a suit to recover \$9,000 for additional compensation for the use and occupation by the United States Civil Service Commission of the claimants' office building, situated on the northwest corner of Eighth and E streets NW., in the city of Washington, during the five years beginning August 1, 1900, and ending August 1, 1905.

The facts in the case are as follows: July 10, 1900, the Secretary of the Interior entered into a written lease for said building, exclusive of the basement, for the use of the Civil Service Commission, for the term of eleven months beginning August 1, 1900, and ending June 30, 1901, for the agreed rental of \$333.33½ per month. August 1, 1900, the Civil Service Commission took possession of the entire building, including the basement, and continued in exclusive possession thereof until the bringing of this suit, August 1, 1905. This lease was entered into pursuant to an appropriation by Congress of \$4,000 for rent for quarters for the Civil Service Commission for the fiscal year ending June 30, 1901. Congress afterwards appropriated the same sum for rent of quarters for the said Commission for the fiscal year ending June 30, 1902, but the claimants refused to renew the lease for that year, insisting that an increase of rental to \$6,000 should be allowed them. The Civil Service Commission, however, continued its occupation of the building, including the basement, the defendants for the latter fiscal year paying rent at the rate of \$4,000 per annum. Congress made the same appropriation for rent for the fiscal year ending June 30, 1903. The written lease was not renewed; the claimants again insisted that a rental of \$6,000 should be allowed them, and the Civil Service Commission continued to occupy the whole building for the fiscal year ending June 30, 1903, and the defendants continued to pay rent therefor at the rate of \$4,000 per annum. Congress appropriated \$4,500 for rent for quarters for the fiscal year ending June 30, 1904, whereupon the Secretary of the Interior entered into a lease with the claimants for that fiscal year for all of said building, except the basement, at the rate of \$4,500 per annum; and the Commission continued to occupy the basement as before. Congress again appropriated \$4,500 for rent for the Commission for the fiscal year ending June 30, 1905, and the Secretary of the Interior requested the claimants to renew the lease last mentioned for the latter year, but the claimant declined and asked an allowance of 30 cents per square foot for the use of said basement. No further action, however, was taken by either party with reference to the renewal of the lease or the increase of rental. The defendants continued in possession of the whole building for that fiscal year and paid rent therefor at the rate of \$4,500 per annum. The same appropriation for rent was made by Congress for the fiscal year ending June 30, 1906, and the Commission continued in possession of the whole building without any renewal of the written lease until August 1, 1905, and for which the claimants have been paid rent at the rate of \$4,500 per annum. During these years the claimants have received for the rent paid them in full except for the basement, which has always been excepted.

The claim of the plaintiffs is made up of two distinct parts, and which require separate consideration: (1) An increase of rent for the building, exclusive of the basement, during such part of the five years as it was used and occupied without any written lease, and (2) rent for the basement of the building (which was never included in any lease) during the whole term of five years.

I. The facts touching the first claim, briefly stated, are: The Commission occupied the building from August 1, 1900, to June 30, 1901, under a written lease, the defendants paying a rental therefor at the rate of \$4,000 per year, and held over without any renewal of the lease until June 30, 1903, in the meantime paying the same rental. The written lease for the following fiscal year, ending June 30, 1904, was renewed at the rate of \$4,500 per annum, and the Commission occupied the building under it for that fiscal year, and held over until August 1, 1905, without any renewal of the lease, but during the latter period paying rental at the rate of \$4,500 per annum, as specified in the latter written lease.

It is evident that during such part of the period of five years, extending from August 1, 1900, to August 1, 1905, as the Government occupied the building without any written lease it was as a tenant holding over after the expiration of the former written leases. The alleged demands for possession on the part of the claimants were nothing more than threats for the purpose of securing a higher rental, and never ripened into a denial of the relation of landlord and tenant. This conclusion is made positive by the fact that during the whole period the claimants receipted in full for the rent received, exclusive of the basement, without any protest, except continuous complaint that they were not getting enough rent for the building.

It hardly seems necessary to quote or even cite authorities to show that the complaints and threats of the claimants did not amount to a notice to quit. (*Taylor's Landlord and Tenant*, sec. 483, and cases cited.)

It is also elementary that where the landlord suffers the tenant to remain in possession after the expiration of his lease the law presumes the holding to be upon the same terms as the written lease under which the entry was made. (*Taylor's Landlord and Tenant*, sec. 525; *Lovett v. United States*, 12 C. Cls., 67, 84; *Salisbury v.*

19 *Hale*, 12 Pick., 332.) The receipts in full given by the claimants enlarge this presumption into a positive conclusion. (*United States v. Childs*, 12 Wall., 232; *Murphy v. United States*, 104 U. S., 464; *De Arnaud v. United States*, 151 U. S., 483.) It has been held that acceptance of rent at a reduced rate after the expiration of a lease is conclusive evidence of modification of the lease. (*United States v. Bostwick*, 94 U. S., 67.)

It follows, therefore, conclusively, that the claimants can not recover under the first division of their case. It should be added, however, that the reasons hereinafter given for denying recovery under the second division apply with equal force to the first.

II. It is contended by the claimants that as the basement of the building was never included in any of the leases they are entitled to recover reasonable rent for the same during the whole period of five years upon an implied contract to that effect; and it is undoubtedly true that if the Government were an ordinary tenant such contention would be correct.

The several appropriation acts of Congress making provisions for the rent for quarters for the Civil Service Commission for the several years while the building of the claimants was so occupied, leaving out everything except the specific appropriation, were as follows:

"That the following sums be, and the same are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, in full compensation for the service of the fiscal year * * * for the objects hereinafter expressly named: * * * For rent * * * Civil Service Commission, four thousand dollars."

The laws then in force relating to this subject were as follows:

"SEC. 3679. No Department of the Government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract for the future payment of money in excess of such appropriations."

"SEC. 3732. No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year."

Act of June 22, 1874 (18 Stat. L., 144):

"And hereafter no contract shall be made for the rent of any building or part of any building in Washington, not now in use by the Government, to be used for the purposes of the Government until an appropriation therefor shall be made in terms by Congress."

Act of March 3, 1877 (19 Stat. L., 370):

"And hereafter no contract shall be made for the rent of any building, or part of any building, to be used for the purpose of the Government in the District of Columbia, until an appropriation therefor shall have been made in terms by Congress, and that this clause be regarded as notice to all contractors or lessors of any such building or part of building."

The counsel on both sides in this case have shown great industry and displayed much learning in the discussion of the question involved, as its importance has well justified.

20 The claimants rely much upon the law of Congress creating the Civil Service Commission (22 Stat. L., 403), which provides as follows:

"That it shall be the duty of the Secretary of the Interior to cause suitable and convenient rooms and accommodations to be assigned or provided, and to be furnished, heated, and lighted, at the city of Washington, for carrying on the work of said Commission and said examinations, and to cause the necessary stationery and other articles to be supplied, and the necessary printing to be done for said Commission."

In reference to this statute it might be sufficient to say that there is nothing in this case to show that the Secretary of the Interior ever had anything to do with directing the occupation of the basement in question, either in person or by implication. It does not appear in any way how or why this was done, the simple fact only appearing that when the Civil Service Commission moved into the building of the claimants it took possession of the whole of it.

If Congress had made no provision for such rent, doubtless the Secretary of the Interior could have secured quarters for the Civil Service Commission and involved the Government for payment of

rent for the same. But Congress did make a specific appropriation for that purpose, and said that was all it would give.

Under the Constitution Congress holds the purse strings of the Government, and we do not think that by evasion or indirection any officer of the Government can deprive that body of this important privilege. Mr. Justice Story, in his Commentaries on the Constitution, in discussing this privilege of Congress, said: "The power to control and direct the appropriations constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public speculation." (2 *Story Com.*, sec. 1348.)

It has frequently been decided that where an individual enters into a government contract with one of its officers, he must take notice of the extent of authority conferred by law upon such officer. This is but an enforcement of the well-established principle that *ignorantia legis non excusat* (*Hawkins v. United States*, 12 C. Cls. R., 181; 96 U. S., 689). The facts in the present case show that the claimants had actual as well as presumptive notice of the extent of the authority of the Secretary of the Interior to enter into a contract for rent for the Civil Service Commission; for during the whole period they were persistently complaining of the small amount which Congress was appropriating for that purpose.

In fact, the opening paragraph of each of the written leases in this case shows a recognition by all parties of the source of authority to contract for rent for the Civil Service Commission, and which is as follows:

"Witnesseth: That in pursuance of authority conferred by an act of Congress approved April 17, 1900, entitled 'An act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and one, and for other purposes,' wherein appropriation is made 'For rent of buildings for the Department of the Interior, namely, * * * for the Civil Service Commission,' the
21 said parties have covenanted and agreed, and by these presents do covenant and agree, to and with each other as follows:"

In the case of *Scammes and Barbour v. United States* (26 C. Cls., 119) cited by claimants, it appeared that the Post-Office Department, after the expiration of a lease for its use, continued to occupy certain premises in the city of Washington under no express contract for rent; and it was held that thereby an implied contract arose to pay a reasonable amount of rent for the same. It does not appear, however, that there was ever any limited appropriation by Congress to pay any rent for the building occupied during such time, or any limited appropriation for rent generally for the post-office at Washington. It should further be observed that the decision in that case is based largely upon the proposition that this occupation was ordered by the Postmaster-General. In other words, in that case the Postmaster-General, without any limitation upon the subject of rent by any law of Congress, ordered the occupation of the claimants' building for the necessary purposes of his Department, and that was held to be no violation of the law.

In that case it was held that section 3679, Revised Statutes, only forbids the execution of an express contract in a sum in excess of appropriations, and that notwithstanding this statute implied contracts might arise from the acts of public officers in the performance of their duties carrying on the business of the Government entrusted to them by law in their respective spheres; and the same construction has been given to that statute in numerous other cases. But no case has been called to our attention where it has been decided that an implied contract might arise under the circumstances of the case at bar. In none of the numerous cases cited by the claimants construing the statutes above quoted, does it appear that a limited appropriation had been made by Congress for a particular purpose, and that an additional expense had been incurred by a subordinate official for which payment was demanded.

In this connection it may be well to quote the language of the Supreme Court (the italics being ours) in the case of *Chase v. United States* (155 U. S., 489, 502):

"While the Postmaster-General, under the power to establish post-offices, may designate the places—that is, the localities—at which the mails are to be received, he can not bind the United States by any lease or purchase of a building to be used for the purposes of a post-office unless the power to do so is derived from a statute which either expressly or by necessary implication authorizes him to make such lease or purchase. The general authority 'to establish post-offices' does not itself, or without more, necessarily imply authority to bind the United States by a contract to lease or purchase a post-office building, although an appropriation of money to pay for the rent of a post-office building at a named place might give authority to the Postmaster-General to lease such building in that locality as he deemed proper for the service, *always keeping within the amount so appropriated*. So, also, the power to lease a building to be used as a post-office may be implied from a general appropriation of money to pay for rent of post-offices in any particular fiscal year or years."

In the *Smoot* case (38 C. Cls., 418) there was no question of implied contract involved. On the contrary, in that case there was too much of an *express* contract, *i. e.*, a written lease for five
22 years, and occupancy for less than three. It was there held that this contract was only binding upon the Government to the end of the fiscal year in which it was made, with a future option from year to year to the end of the term; but that when the Government abandons leased premises under such circumstances in the midst of a fiscal year it is liable for rent for the whole of that year. In the same case it is held that "occupancy by an unauthorized officer of the United States will not have the effect of continuing a lease." (*Id.*, 427.)

During all of the time for which additional rent is sought to be recovered in this case, the law forbade any Department of the Government from involving the Government in any express contract for rent for quarters for the Civil Service Commission in any sum in excess of the amount specifically appropriated for that purpose. Congress, from year to year, specifically appropriated a sum for

each fiscal year *in full* for that purpose, and the Secretary of the Interior, pursuant to such appropriations, has rented quarters for that Commission.

To now hold that the Civil Service Commission can take possession of the whole of a building, a part of which has been rented for its use pursuant to an act of Congress, and make the Government liable for this additional expense, would be equivalent to saying that Congress is powerless in limiting the expenses of the Government. Under such a holding the Civil Service Commission might have "swarmed" into possession of the whole block in which they were located and involved the Government in payment for rent of the same. Such a ruling would place the Treasury of the Government at the mercy and convenience of every one of its officers. We have been cited to no authority sustaining such a conclusion, and do not believe it to be the law.

We might add that section 3679, Revised Statutes, *supra*, has recently been amended by Congress by providing:

"Nor shall any Department or any officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property. All appropriations made for contingent expenses or other general purposes, except appropriations made in fulfillment of contract obligations expressly authorized by law, or for objects required or authorized by law without reference to the amounts annually appropriated therefor, shall, on or before the beginning of each fiscal year, be so apportioned by monthly or other allotments as to prevent expenditures in one portion of the year which may necessitate deficiency or additional appropriations to complete the service of the fiscal year for which said appropriations are made; and all such apportionments shall be adhered to and shall not be waived or modified except upon the happening of some extraordinary emergency or unusual circumstance which could not be anticipated at the time of making such apportionment, but this provision shall not apply to the contingent appropriations of the Senate or House of Representatives; and in case said apportionments are waived or modified as herein provided, the same shall be waived or modified in writing by the head of such Executive Department or other Government establishment having control of the expenditure, and the reasons therefor shall be fully set forth in each particular case and communi-

23 cated to Congress in connection with estimates for any additional appropriations required on account thereof. Any person violating any provision of this section shall be summarily removed from office and may also be punished by a fine of not less than one hundred dollars or by imprisonment for not less than one month." (34 Stat., 49)

Thus we see that Congress has not only said that its specific appropriations must not be exceeded for any fiscal year, but that they must be so apportioned throughout the year as to prevent a deficiency, with the provision of a penalty for a violation of this most salutary law.

If, by indirection, any officer of the Government can evade this statute by involving the Government in implied contracts, Congress might as well hereafter make no specific appropriations at all, but leave it to subordinate officers of the Government to make the bills, and pay them by appropriations in gross.

It is ordered that judgment be entered for the defendants, dismissing the petition.

Howry, J., was not present when this case was tried and took no part in the decision.

24

IX.—*Final Judgment.*

At a Court of Claims held in the City of Washington on the 9th day of March, A. D., 1908, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants, and do order, adjudge and decree that the petition of the said Robert A. Hooe and Arthur Herbert claimants, be and the same is hereby dismissed.

BY THE COURT.

25 X.—*Claimants' Application for, and Allowance of, Appeal.*

The claimants make application for an appeal from this court to the Supreme Court of the United States on the findings, conclusion of law and judgment rendered herein.

DUDLEY & MICHENER,
Attorneys for Claimants.

Filed May 25, 1908.

Ordered:

This 25th day of May, 1908, that the above application for appeal be allowed as prayed for.

BY THE COURT.

26

XI.—*Certificate.*

Court of Claims.

No. 28238.

ROBERT A. HOOE & ARTHUR HERBERT
vs.

THE UNITED STATES.

I, Archibald Hopkins, Chief Clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the Court, and the conclusion of law thereon, of the opinion of the Court, of the judgment of the Court, of the application of the claimants for, and

the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington, this 23d day of June, A. D., 1908.

[Seal Court of Claims.]

ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 21,235. Court of Claims. Term No. 439. Robert A. Hooe and Arthur Herbert, appellants, *vs.* The United States. Filed June 23d, 1908. File No. 21,235.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 183.

ROBERT A. HOOE AND ARTHUR HERBERT,
APPELLANTS, *vs.* THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANTS' BRIEF.

I.

Statement of the Case.

The petition is for the use and occupancy by the United States of the northwest corner of E and Eighth Streets, Northwest, City of Washington, and the amount claimed as due is \$9,000. (See petition, Rec. 1-3.) The case is reported in 43 C. Cls., 225.

1. The findings of fact (Rec. 6-9) state that appellants have been and are the owners of the property above named, and that the Secretary of the Interior, under authority of the Act of June 30, 1901, entered into a written contract with the appellants, whereby

the buildings and premises described, *except the basement thereof*, were leased to the Government for the use of the Civil Service Commission, commencing August 1, 1900, and ending June 30, 1901, at the rate of \$333.33 $\frac{1}{3}$ per month, and the Commission took possession of the entire building, *including the basement*, and continued in exclusive possession until the bringing of the action, August 1, 1905. The amount appropriated by Congress for the rent of offices for that Commission for the fiscal year ending June 30, 1901, was \$4,000, one-twelfth of which was expended as rent for the offices of the Commission for the month of July, 1900, before this tenancy began.

2. March 3, 1901, Congress appropriated \$4,000 for rent for the quarters for the Commission for the fiscal year ending June 30, 1902, and the Secretary of the Interior wrote to the appellants proposing a renewal of the lease for that year, but the appellants wrote him, refusing so to do at the rate of \$4,000 per annum, and stated that they could not rent the entire building, including the basement then occupied by the Commission, at less than \$6,000 per annum in justice to themselves.

3. In the estimates for the appropriations for the fiscal year ending June 30, 1903, the Secretary submitted to Congress one for an increase to \$6,000 for rent of quarters for the Commission, but the House did not agree, and the agent of the appellants wrote the chief clerk of the Department of the Interior that, unless that estimate of \$6,000 was restored by the Senate, he was instructed by appellants to ask possession of the property at the earliest convenient time. The Senate was also informed of that con-

clusion on the part of the appellants. The agent appeared, also, before the Committee on Appropriations of the House in behalf of appellants, and stated that they would demand possession of the building unless an appropriation of \$6,000 was made for the rental of the entire building. The Secretary of the Interior transmitted to the chairman of the Senate Committee on Appropriations the letter from the agent of the appellants containing the statement that the possession of the building would be demanded unless that increase was made. Congress did not increase the appropriation, but did appropriate \$4,000 for rent for quarters for the Commission for the fiscal year ending June 30, 1903, the same as in the preceding years. No further action was taken by either party relative to the increase of the rent or the demanding of possession, and the Commission continued in possession of the property, including the basement, for that fiscal year.

4. In the estimates for appropriations for the fiscal year ending June 30, 1904, the Secretary of the Interior rendered his estimate of \$6,000 for the rent of such quarters, and Congress increased the appropriation \$500, thus making it \$4,500. Following that increase in appropriation, the Secretary entered into negotiations with appellants by correspondence for the rent of all the building and premises for the use of the Commission for the \$4,500 appropriated, but appellants refused to rent all the building and premises for \$4,500 per annum. The Secretary finally made a lease with them, August 18, 1903, for all of the building, except the basement, for that fiscal year, at the rate of \$4,500, the other provisions of the lease being like those of the lease first made.

5. May 18, 1904, Congress appropriated the sum of \$4,500 for rent for the quarters of the Commission for the fiscal year ending June 30, 1905, and on November 15, 1905, the Secretary made a proposal to appellants by letter for a renewal of the lease of August 18, 1903, for the fiscal year ending June 30, 1905, at the rate of \$4,500 per annum. The appellants took no action in the matter further than to ask that the basement be included at the rate of 30 cents per square foot. No lease was made for that fiscal year, but the appellants were paid rent for that year at the rate of \$4,500.

6. The appropriation for the rent of quarters for the Commission for the fiscal year ending June 30, 1906, was also in the sum of \$4,500, and the Commission, without any express renewal of the lease for that fiscal year, continued in occupation of the entire building, including the basement, up to August, 1905, the date of the filing of the petition in this case, and paid the appellants rent at the rate of \$4,500 per year.

7. The basement was used by the Civil Service Commission during the entire period of occupancy above described, without a lease therefor, the Commission having taken possession of the basement August 1, 1900, and having continued in the occupancy and use thereof until this action was brought, all with the knowledge of the Secretary of the Interior. The fair rental value of that portion of the basement occupied and used by the Commission was \$400 per year, and the rental value of the entire building, including the basement, was not less than \$6,000 per year.

8. During the time the Commission occupied and used the premises the appellants receipted for rent for the same in full, *except for the basement*, which was especially excluded from each of the receipts given by them, and with the exception of the exclusion of the basement from the receipts, it does not appear that any other protest was ever made by the appellants that the payments were not in full for the rent legally due to them for the building. Appellants have repeatedly insisted that the defendants were not paying enough rent for the building, and on one occasion asked for extra rent for the basement.

On the findings of fact the court below dismissed the petition and entered judgment for the United States.

II.

Assignments of Error.

1. The court below erred in dismissing the petition and rendering judgment in favor of the defendant.

2. And in not giving effect to that provision of the fifth amendment to the Constitution of the United States, to the effect that private property shall not be taken for public use without just compensation, and in holding that the officers of the United States had no authority or power to take possession of appellants' property and occupy it for public purposes, and thus obligate the United States to make just compensation for such use and occupancy.

3. The court below erred in not rendering judgment in favor of appellants for the value of the use of the basement for five years, in the sum of \$2,000.

4. The court below erred in not rendering judg-

ment in favor of appellants for the balance due for the value of the use of the building during the non-lease periods, in the sum of \$4,391.66.

5. And in not rendering judgment in favor of appellants for the sum of \$6,391.66, which is the sum total of the two amounts above named.

6. And in not rendering judgment for appellants in the sum of \$8,958.33, that being the balance of the rental value of the premises occupied.

III.

Synopsis of Argument.

1. The periods of occupancy.
2. Authority to take and occupy under the right of eminent domain.
3. Legislative authority to take and occupy under Act of January 16, 1883.
4. Consideration of the views of the court below as to the language of general appropriation acts.
5. And of certain other acts relating to the making of express contracts.
6. The Act of January 16, 1883, is a special or particular act, and thus is an exception to general acts or provisions.
7. Effect of occupancy whether with or without lease.
8. Obligation to make compensation is constitutional and does not depend on contract made by an official.
9. Secretary of Interior had no power to make an implied contract with owners of this property.
10. A consideration of the nature of the obligations in this case.

11. Objections made by claimants to the acts of the officials.
12. Receipts given by claimants as payments were made.
13. Amount of compensation due to claimants.

IV.

ARGUMENT.

I.

Periods of Occupancy.

1. The first lease period for the building, exclusive of the basement, was from August 1, 1900, to June 30, 1901—eleven months—at the rate of \$4,000 per annum.

The second lease period for the building, exclusive of the basement, was from July 1, 1903, to June 30, 1904—one year—at the rate of \$4,500 per annum.

The total lease period was one year and eleven months.

2. There was no lease for the building from July 1, 1901, to June 30, 1903—two years—nor from June 30, 1904, to August 1, 1905—one year and one month—a total of three years and one month.

3. The Government occupied the basement all the time—five years—without a lease.

II.

Authority to Occupy Under Right of Eminent Domain.

The first question that naturally arises is as to the authority of some Government official to take posses-

sion of the property, use and occupy it, either under a formal written contract or without any contract.

The right of eminent domain is the offspring of political necessity; it is inseparable from sovereignty unless denied to it by its fundamental law; it reaches back of all constitutional provisions; and it is not necessary here to do more than rely on the fifth amendment of the Constitution, for that amendment not only recognizes the existence of the power, but it states the exact limitation upon its exercise.

The Government of the United States has the absolute power to take private property for public use, just compensation being made. This rule is established by the cases cited hereafter, and it is so well settled as to call for nothing more than its bare statement here.

The Secretary of the Interior and the Civil Service Commissioners were and are officers of the United States charged with the performance of official duties. The United States acted by and through them. The Secretary of the Interior, in order that the Commission might have offices and other requisites for the performance of official duties, occupied this property, through the Commission, for public uses and purposes. In doing that he represented the supreme power of the United States, and his official acts cast upon the Government the constitutional obligation to make just compensation for the use of the property. The actions of the Secretary are not to be regarded as his personal acts but as the acts of the Government. All that he did was by virtue of his position as an officer of the Government, and if there be no specific act of Congress directing him in

the matter, yet if that which he did officially, and which the Government got the benefit of, resulted in the appropriation of the use of this property by the Government, it is to be treated as the act of the latter.

United States v. Lynah, 188 U. S., 465, 466 and cases cited.

Besides that, the House and Senate were fully informed as to what the Secretary of the Interior and the Commission had done. (Rec. 7, 8.)

III.

Legislative Authority to Take and Occupy Under Act of January 16, 1883.

There is ample legislative authority for all that was done in this case.

The Act of January 16, 1883, created the Civil Service Commission. (22 Stat., 403; 1 Fed. Stat., Ann., 809.) The fourth section of that statute is as follows:

That it shall be the duty of the Secretary of the Interior to cause suitable and convenient rooms and accommodations to be assigned or provided, and to be furnished, heated and lighted, at the City of Washington, for carrying on the work of said Commission and said examinations, and to cause the necessary stationery and other articles to be supplied, and the necessary printing to be done for said Commission.

It is plain that this section made it the duty of the Secretary to provide suitable and convenient rooms

and accommodations for the Commission in the City of Washington, furnish, heat and light them, and procure necessary stationery, other articles, and printing for the Commission. It would be difficult to conceive broader powers in this respect than those granted by this section. The Secretary was made a part of the official life and conduct of the Commission.

The statutory authority is broad, comprehensive, and without condition or limitation. Everything suitable and convenient in the way of rooms and accommodations was to be assigned or provided. Nothing less than a repeal, amendment or modification of this statute could destroy, limit or lessen the power granted by it, and there has been nothing of the kind. That act has stood, word for word and without change, since January 16, 1883.

While it is true that this authority runs to the Secretary of the Interior by designation, yet it does not follow that he alone had the right to deal with the subjects covered by the statute. He could well speak and act through his subordinates or through the officials of the Commission. This principle is firmly settled.

Parish v. United States, 100 U. S., 504;

McElrath v. United States, 102 U. S., 436;

McCullum's case, 17 C. Cls., 101, 102.

The United States, by its agents, proceeding under the authority of an Act of Congress, took appellants' property for public uses, and it thereby became obligated, by virtue of the Constitution, to make just compensation, and this action lies for the value of the use and occupancy of their property.

- United States v. Great Falls Mfg. Co.*, 112
U. S., 645, 656, 657;
Great Falls Mfg. Co. v. United States, 124
U. S., 581, 597;
Monongahela Nav. Co. v. United States, 148
U. S., 312, 324-326;
United States v. Lynah, 188 U. S., 445, 460-470.

There is nothing in the record to show, and it cannot be presumed, that the Secretary of the Interior took, or allowed the Commission to take, possession of more property, in the way of "rooms and accommodations," than was "suitable and convenient" for "carrying on the work of said Commission," and, as was said in *Great Falls Mfg. Co. v. United States*, 124 U. S., 581, 597, "consequently, the Government is under a constitutional obligation to make compensation for any property or property right taken, used, and held by him for the purposes indicated in the Act of Congress," . . .

In that case, as in the case at bar, the lands taken had "substantial connection" with the objects and purposes of the work undertaken by the Government, and no assault was made on the motives or conduct of the Secretary.

In the case last cited, as in the case at bar, there was no statutory direction to take the particular property, but, as was said in *United States v. Lynah*, 188 U. S., on p. 467, there was "a direction to do that which resulted in a taking, and it was held that the owner might waive the right to insist on condemnation proceedings and sue to recover the value." See, also, pp. 460-465.

Therefore we conclude that the taking of the property here was authorized by the sovereign power inherent in the United States, by the language of the fifth amendment, and by the Act of January 16, 1883, heretofore quoted, and that everything done by the Secretary was for the use and benefit of the United States, and resulted in its enjoyment and occupancy of the property belonging to the appellants.

The Court of Claims found that the value of the use of the property, including the basement, was at least \$6,000 per year, and that for the first three years of its occupancy the United States paid appellants \$4,000 per annum, and for each of the remaining two years \$4,500 per annum, exclusive of the basement. Just compensation has not been made.

IV.

Consideration of the Views of the Court Below as to the Language of the General Appropriation Acts.

The opinion of court below (Rec. 12) masses the statutes that the court thought stood in the way of a recovery by the appellants. The court said:

The several appropriation acts of Congress making provisions for the rent for quarters for the Civil Service Commission for the several years while the building of the claimants was so occupied, leaving out everything except the specific appropriation, were as follows:

“That the following sums be, and the same are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, in full compensation for the service of the fiscal

year * * * for the objects hereinafter expressly named: * * * For rent * * * Civil Service Commission, four thousand dollars."

The laws then in force relating to this subject were as follows:

"SEC. 3679. No Department of the Government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract for the future payment of money in excess of such appropriations.

"SEC. 3732. No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year."

Act of June 22, 1874 (18 Stat. L., 144):

"And hereafter no contract shall be made for the rent of any building or part of any building in Washington, not now in use by the Government, to be used for the purposes of the Government until an appropriation therefor shall be made in terms by Congress."

Act of March 3, 1877 (19 Stat. L., 370):

"And hereafter no contract shall be made for the rent of any building, or part of any building, to be used for the purpose of the Government in the District of Columbia, until an appropriation therefor shall have been made in terms by Congress, and that this clause be regarded as notice to all contractors or lessors of any such building or part of building."

We do not know how long such language as that first above quoted has been used in our appropriation acts, but we have found it as far back as the Act of August 5, 1882, 22 Stat., 219, five months before the Civil Service Commission was created by law.

Sec. 3679 R. S. goes back to July 12, 1870, 16 Stat., 251, and Sec. 3732 to March 2, 1861, 12 Stat., 220, while the remaining acts quoted by the court are dated June 22, 1874, and March 3, 1877. All of these statutes were passed before the Commission was created by the Act of January 16, 1883.

Since these dates this court and the Court of Claims have adjudicated many cases growing out of Departmental transactions in the way of taking property, and have found nothing in the language of the acts quoted to bar a recovery on the part of the owners. It is scarcely possible that the existence of these statutory provisions has escaped the vigilant eyes of counsel and the careful scrutiny of the courts in the past. It would seem, therefore, that we need not pay further attention to them now, but we will make these observations:

1. The language first quoted from the appropriation acts has not barred recovery in a solitary case, nor should it do so, for the reason that no Act of Congress can defeat or nullify the obligation contained in the fifth amendment. The latter must prevail. An appropriation act fixes the amount to be paid by the Government in a certain fiscal year, but it does not strike to earth a constitutional obligation by failing to provide enough money to discharge that obligation.

Shipman's case, 18 C. Cls., 138, 147;
Graham's case, 1 C. Cls., 381;
Collins' case, 15 C. Cls., 22, 35;
Briggs' case, 15 C. Cls., 48;
Parsons' case, 15 C. Cls., 246.

2. When an act authorizes the officer to do a particular thing without restriction as to cost, and an inadequate appropriation is made, and the same thing done inures to the benefit of the Government, or is accepted by the proper public officers, an action will lie for the reasonable value thereof.

Shipman's case, 18 C. Cls., 138, 146, 147;
Freedman's Bank case, 16 C. Cls., 19, 29.

V.

Consideration of the Views of the Court Below as to Certain Acts Relative to the Making of Express Contracts.

The remaining statutes quoted by the court below clearly relate to express contracts, prohibit the making of *express contracts only*, apply to officials and not to citizens, and do not apply to those cases or legal rights which arise from the acts of public officers with reference to property in carrying on the business of the Government entrusted to them.

N. Y. C. & H. R. R. R. case, 21 C. Cls., 468, 472, 473;
Semmes & Barber case, 26 C. Cls., 129, 130;
Rives' case, 28 C. Cls., 249, 252;
Smoot's case, 38 C. Cls., 418, 427.

We submit that the language of those statutes is not susceptible of any other interpretation; that they do not stand in the way of a recovery here; and that no legislative enactment can minimize the force of the fifth amendment or defeat its operation.

VI.

Act of January 16, 1883, is a Special or Particular Act, and is an Exception to General Acts.

Another consideration of controlling force here, as we think, lies in the fact that the Act of January 16, 1883, is a special act, dealing with a special subject and conferring special powers on the Secretary of the Interior. It therefore falls under the well-settled rule that a special act must be taken as intended to constitute an exception to general acts or provisions, and the presumption is that the special act is to be considered as remaining an exception to them.

Rodgers v. United States, 185 U. S., 83, 87-89;
Ex parte Crow Dog, 109 U. S., 556, 570.

This being a special or particular act, the things done under it are not subject to the provisions or the prohibitions of any general acts.

The rule above stated was applied in *N. Y. C. & H. R. R. R. case*, 21 C. Cls., 468-472, in which it was held that an act appropriating money to be expended by the Postmaster-General in obtaining proper facilities for the railway mail service was a special or particular act, to which sections 3679 and 3732, R. S., must yield.

The rule was applied in—

McCullom's case, 17 C. Cls., 92;

Shipman's case, 18 C. Cls., 147;

Dougherty's case, 18 C. Cls., 503;

Beaman's case, 19 C. Cls., 9.

It follows that the statutes relied on by the court below are inapplicable here.

VII.

Effect of Occupancy Whether With or Without Lease.

For the sake of convenience we will again state the periods and kinds of occupancy.

1. The first lease period for the building, exclusive of the basement, was from August 1, 1900, to June 30, 1901—eleven months—at the rate of \$4,000 per annum.

The second lease period for the building, exclusive of the basement, was from July 1, 1903, to June 30, 1904—one year—at the rate of \$4,500 per annum.

The lease periods amounted to one year and eleven months.

2. There was no lease for the building from July 1, 1901, to June 30, 1903—two years—or from June 30, 1904, to August 1, 1905—one year and one month—a total of three years and one month without lease.

3. The Government occupied the basement all the time—five years—without a lease.

The Secretary entered into two leases in writing, as above stated, and caused or permitted the building to be occupied for the remainder of the holding periods without a lease in writing; and, during all

of the period of occupancy covered by this action, he caused or permitted the basement to be used and occupied by the Government without a lease in writing. For the period of three years and one month the building above the basement was occupied by the Government without lease, and the basement was thus occupied for the whole five-year period without lease.

The court below held that, during the non-lease period, the Government "was as a tenant holding over after the expiration of the former written lease." (Rec. 11.)

That is a familiar rule of the law of landlord and tenant as between private persons, but we think it does not apply to this particular case, and for the following reasons:

1. Where there is no *express contract* for the use of property in present occupation by the Government, the obligation to make just compensation is fixed by the fifth amendment, and it attaches *eo instanti*.

The question arose squarely in the *Semmes & Barbour case*, 26 C. Cls., 119, decided January 12, 1891. That was an action to recover for the use of certain premises in the City of Washington that had been occupied by the Government as a city post-office. The Government made a lease with the claimants for the basement, first and second stories of the Seaton House, dated September 25, 1879, for five years from the date the premises should be occupied by the United States, which occupancy began on the 15th day of November, 1879, thus making the lease period end November 15, 1884. The agreed rental

was at the rate of \$5,000 per annum, payable quarterly, and it was paid up to November 15, 1884. After the expiration of the lease the value of the rent of that portion of the premises covered by it was more than \$5,000 per annum. The Government continued to hold the leased portion of the premises, and certain rooms which it had taken possession of in the third story, paying the owners of the building for such occupancy of the leased premises at the rate of \$5,000 per annum, although the true value of the use of the occupied portion, after the expiration of the lease, was \$8,000 per annum.

As we have stated, the lease expired November 15, 1884. The owners of the building, November 30, 1886, gave written notice to the Government (p. 123) that after December 31, 1886, the rent of the property then occupied would be \$8,000 per annum; that they were unwilling to rent it for less than that amount; they demanded that the premises be vacated by December 31, 1886, unless the Government would pay at the rate of \$8,000; and they relinquished any right to a higher rental prior to the date last named. The Government refused to surrender the premises, and continued to hold and use them, but failed to pay more than \$5,000 therefor.

The controversy related to the rental value of the basement, and first and second stories, from January 1, 1887, to June 30, 1888, \$12,000, on account of which \$7,500 had been paid, and the value of the use of the rooms on the third floor of the building from January 1, 1883, to June 30, 1888. (See last paragraph of the opinion.) The opinion of the Court of Claims was written by Judge Weldon, who first made

a clear summary of the findings (pp. 128, 129), held that the Postmaster-General had the power to make the lease, and said, on page 131 :

Since the first day of January, 1887 (that being the time from which the claimants date their right of recovery), the defendants have held the leased property against the demand of the claimants, without any express contract as to tenure or compensation. The Postmaster-General has not violated any statute, because he has not attempted, since the execution of the contract made in September, 1879, to lease any [of] the premises for the use of and occupation of the Department. We do not hold that the failure to vacate the premises as demanded in the communication of November 30, 1886, created an express contract and subjected the defendants to the payment of the sum of \$8,000 from the first of January, 1887; but we find that the rental value of the premises, from that time until the 30th of June, 1888, was worth at the rate of \$8,000 per annum.

The court rendered judgment for the claimants in the sum of \$6,012. The case was not appealed and the judgment was paid.

That case is in point here, we think. There the lease expired by virtue of its own terms on the 15th day of November, 1884. Here the first lease expired June 30, 1901, and the next one expired June 30, 1904. In other words, the leases became *functus officio* at the end of their respective fiscal years. The Court of Claims, in the *Semmes and Barbour* case, did not understand the rule to be as stated by that court in the case at bar, viz: that the Government was a ten-

ant holding over after the expiration of the former lease, and was liable only to the extent of the covenants in such former lease, thus extending the operation of that lease and giving it new life. The court, in the former case, plainly proceeded on the theory that the obligation was because of the continued occupancy of the premises after the expiration of the written lease, taking effect from the date named in the notice, lasting during the period of that occupation thereafter, and it was by virtue of that obligation that the judgment was rendered. The court, in the quotation above made, expressly repudiated the theory that the notice created an express contract, as it would have done when followed by occupancy in the case of individual parties, but put the right of recovery on the ground of just compensation, thus making the right rest on the Constitution.

The *Semmes and Barbour* case is very much like the case at bar in other respects. There, as here, the Government occupied a portion of the premises beyond those described in the written lease; there, as here, the Government paid to the owners much less than the real value of the use of the premises it occupied; there, as here, the owners tried to better their condition by giving the Government to understand that the possession of the premises was expected unless it paid a higher figure, but no attempt was made to dispossess; there, as here, the owners gave receipts for the money received by them. While it is not stated in the findings or in the opinion in that case that such receipts were executed by the owners, yet it must be apparent to those having knowledge of governmental methods of disbursement that receipts were taken from them.

VIII.

**Obligation to Make Compensation is Constitutional
and Does not Depend on a Contract
Made by an Officer.**

The obligation to make compensation is constitutional and does not depend in any degree upon the making of a contract, either express or implied, by a Government official. The Government is under a constitutional obligation to make compensation for any property or property right taken, used and held for lawful Government purposes.

United States v. Great Falls Mfg. Co., 112 U. S., 645, 656;

Great Falls Mfg. Co. v. Atty.-Gen., 124 U. S., 581, 597;

United States v. Russell, 13 Wall., 623, 627-630.

As was said by this court in *Bauman v. Ross*., 167 U. S., 548, 574:

The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.

To award the appellants the value of what they have been deprived of would be to require the court below to render judgment on the basis of \$6,000 per annum, that being the amount found by that court

to be the actual value of the use and occupation of the premises; to award them less than that would be unjust to them and would not comply with the requirement of the Constitution. In no other way can they receive "the just compensation required by the Constitution to be made to the owner," for that compensation "is to be measured by the loss caused to him by the appropriation." That compensation is not to be measured in cases of this character by the action of a Government official, nor by legislative enactment. Congress cannot fix such compensation, for the question of the amount or measure of the compensation is judicial, and not legislative.

Monongahela Nav. Co. v. United States, 148 U. S., 327.

It follows that the combined action of Congress and of the administrative officer cannot fix the measure of the compensation. The obligation is constitutional, and the fixing of the measure of the compensation is judicial, where the owner on the one hand and the Government official on the other have not reached a valid agreement as to the amount. The court below, however, dealt with this question upon an entirely different basis, and thus it erred.

IX.

Secretary of Interior had no Power to Make an Implied Contract with Owners of this Property.

Again, it was out of the power of the Secretary of the Interior to make an "implied contract" with the

owners of this property, for he was forbidden by Section 3744 to do anything of that kind. That section requires the Secretary of War, the Secretary of the Navy and the Secretary of the Interior to "cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; . . ." It then requires a copy of each contract so made to be filed in the Department of the Interior, etc. This section prohibits the Secretary of the Interior from making a contract in any other manner, for it is mandatory and imperative in its requirements. That section was considered by this court in *Clark v. United States*, 95 U. S., 539, 541, 542, where it was said:

It makes it unlawful for contracting parties to make contracts in any other way than by writing signed by the parties. This is equivalent to prohibiting any other mode of making contracts.

That case was followed and approved in *South Boston Iron Co. v. United States*, 118 U. S., 37, 42.

We think it plain that the legislative determination has been clearly expressed that the Secretary of the Interior shall not make any contract that may be obligatory upon the United States but in the manner prescribed by this section. An "implied contract," therefore, such as the Court of Claims has endeavored to establish, was beyond the power of the Secretary to make in a case of this character.

X.

**A Consideration of the Nature of the Obligations in
This Case.**

It follows that we are standing here on two written leases for a total of one year and eleven months, and on the constitutional obligation for three years and one month; and we submit that the obligation of the Constitution does not depend upon any form or character of implication. That obligation is plain and positive, and is not one of inference or implication.

The existence of a constitutional obligation is recognized by the Act of March 3, 1887 (24 Stat., 505), commonly known as the Tucker Act. The first paragraph confers jurisdiction on the Court of Claims to hear and determine "all claims founded upon the Constitution of the United States." Prior to that time that court did not have jurisdiction of claims that were founded on constitutional obligations or provisions. Section 1059, R. S., gave the Court of Claims jurisdiction of "all claims founded upon any law of Congress," but it did not embrace claims that were founded on the Constitution. That failure to cover claims that were bottomed on constitutional provisions resulted in so many acts of injustice, or failures of justice, that Congress was induced to pass the Tucker Act. The history of the litigation that produced this legislation is well stated by Judge Nott in *Stovall, Admr., v. United States*, 26 C. Cls., 226, 237-240, in which it is held that the Tucker Act extended the jurisdiction of the court to constitutional obligations for the occupation or use of real property, and "irrespective of the technical rules and re-

finements of the common law, or of the ambiguities and uncertainties of statutory provisions and definitions."

Prior to the Tucker Act the Court of Claims sometimes had to resort to the fiction of "an implied contract" in order to maintain jurisdiction. Since the passage of that act cases of this character have had just recognition as being constitutional in their origin, "founded upon the Constitution." In *Dooley v. United States*, 182 U. S., 222-224, this court divided the cases covered by the first section of that act into "four distinct classes of cases," the first being "those founded upon the Constitution or any law of Congress," and the third being "cases of contract, expressed or implied, with the Government."

By that act the Congress gave legislative recognition to cases of this character, and conferred jurisdiction on the Court of Claims to hear and determine them. Therefore we are not obliged, in the case at bar, to show an "implied contract" for the non-lease period covered by this occupancy, and it is enough for us to establish that occupancy, with the concurrent recognition by the Government of title in the appellants, and prove the value of the use of the property.

The words "implied contract," which may have become venerable by long usage, are really inexact. The law does not "imply a contract." What the law actually does is to empower the court to infer a contract from a given state of facts or conditions. The court infers the contract to be one which the defendant should have made in justice and right. *Ingram's case*, 32 C. Cls., 147, 148, 164, 165, in which Chief Justice Nott wrote a learned opinion.

Blackstone says (3 Com. side, p. 158) that contracts implied by law "are such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform, and upon this presumption makes him answerable to such persons as suffer by his non-performance."

Why should the court or the law be expected to infer or presume a contract, or why should it actually do so, when the obligation is made by the Constitution? An obligation created by the Constitution is beyond the realm of inference or implication—it is *an existing legal entity*. If not, why should Congress have recognized that form of obligation and have conferred jurisdiction of it upon the Court of Claims by express language? Could not the court infer or "imply" a contract from an Act of Congress with equal readiness and certainty? Yet Congress early conferred express jurisdiction on the Court of Claims to hear and determine cases "founded upon any law of Congress." Sec. 1059. The Court of Claims has had jurisdiction, ever since its organization as a court, of cases founded upon contracts "expressed or implied." If the court could have inferred or implied a contract from any law of Congress, why should that express grant of jurisdiction have been made?

Judicial decisions prove that something more than Section 1059 was needed to confer jurisdiction where constitutional obligations were involved, and therefore the Tucker Act made use of the words, "founded upon the Constitution." The Constitution and the Tucker Act, either singly or in union, take this case beyond the realm of "implied" or "inferred con-

tracts," and make it stand entirely as one of plain and simple constitutional obligation.

XI.

The Objections Made by the Claimants to the Acts of the Officials.

1. In Finding III it is stated that Congress, May 3, 1901, appropriated \$4,000 for rent of quarters for the Commission for the next fiscal year, and shortly after the beginning of that fiscal year the Secretary of the Interior wrote appellants, proposing a renewal of the lease for that year, in response to which the appellants wrote the Secretary that they were unwilling to bind themselves to rent the building for another year at the rate of \$4,000 per annum, and stated that they could not with justice to themselves rent the entire building, including the basement, then occupied by the Commission, at less than \$6,000 per annum. No further action was taken for that fiscal year, and the Government continued in possession of the building and basement and paid appellants \$4,000.

2. In his estimates for appropriations for the fiscal year ending June 30, 1903, the Secretary submitted to Congress an estimate for an increase to \$6,000 for rent of quarters for the Commission, but as that sum was not included in the bill for that fiscal year, as passed by the House, the agents of the appellants wrote the chief clerk of the Department of the Interior that, unless that estimate of \$6,000 was restored by the Senate, he was instructed by appellants to ask possession of the property. The Senate

was also informed of that conclusion of the appellants. That agent also appeared before the Committee on Appropriations of the House of Representatives in behalf of appellants, and stated that the appellants would demand possession of the building unless \$6,000 was appropriated for rental, and the Secretary of the Interior transmitted to the chairman of the Senate Committee on Appropriations the letter from the agent of the appellants above mentioned. Congress did not increase the appropriation for the fiscal year ending June 30th, but appropriated \$4,000 instead, and that amount was paid for that year.

3. In Finding IV it is stated that in the estimates for appropriations for the fiscal year ending June 30, 1904, the Secretary of the Interior renewed his estimate for an increase of \$2,000 for rent of quarters for the Commission, and Congress appropriated \$4,500. The Secretary then entered into negotiations with appellants by correspondence for the rent of all the building and premises for \$4,500, but appellants refused, and he finally made a lease with them, August 18, 1903, for all the building except the basement, for that fiscal year at the rate of \$4,500.

4. May 18, 1904, Congress appropriated \$4,500 for rent of quarters for the Commission for the next fiscal year, and November 15, 1904, the Secretary made a proposal by letter to the appellants for a renewal of the lease of August 18, 1903, for the fiscal year ending June 30, 1905, at the rate of \$4,500 per annum. Appellants took no action in response to that proposal, further than to write the Secretary of the Interior, requesting that the basement of the

building, which had not been included in either of the leases, be included at the rate of 30 cents per foot for its floor space. No further action was taken by either party with reference to the renewal of the lease or increase of rental for that fiscal year, and the appellants were paid rent at the rate of \$4,500.

5. In Finding VI it is stated that with the exception of excluding the basement from the receipts given by the appellants, it does not appear that any other protest was ever made by the appellants that the payments were not in full for the rent legally due to them for the building. "The claimants, however, repeatedly insisted that the defendants were not paying enough rent for said building, and on one occasion asked for extra rent for said basement, as heretofore found."

It is perfectly plain from these findings that appellants repeatedly and consistently objected to the use and occupation of the entire property by the Government for less than \$6,000 per annum, and the Secretary of the Interior recognized the justice of their position. They asserted their claims and rights at every opportunity and within the rules of law, not only to the Secretary of the Interior, but to both branches of Congress. The Government officials were fully advised all the time concerning the views, claims, demands and assertions of right on the part of the appellants, and the Government had full notice and knowledge thereof. These things were not done in a bushel. Not for one moment did appellants concede the right of the Government to use and occupy the entire property at a rental or valuation of less than \$6,000 per annum, and their

behavior was such that the Government was not misled for one moment.

Appellants' conduct was of such a character as to give the Government ample warning, both in the Department and in Congress, and to put and keep it on its guard and at the same time preserve to the appellants their right to demand the amount due for the use and occupation of the whole property. Their conduct is inconsistent with any other view or theory.

Everything that was said and done in the way of objection or complaint was for the purpose of showing that while appellants were willing that the Government should occupy their property, they were not willing that it should be done without just and adequate compensation. It is true that they did not resort to an action in ejectment for the recovery of the possession of their property, but it is equally true that they were well within their legal rights when they allowed the Government to remain in possession of the real estate and take what the Government paid them, but always complaining against the amount paid or proposed to be paid, and objecting that they were not receiving from the Government just and reasonable compensation. Thus, while on the one hand they were consenting that the Government might occupy, they were also reserving to themselves the right to insist upon adequate, just and reasonable compensation.

The circumstances of the whole transaction, from beginning to end, the complaints and objections made by the appellants, directly or indirectly, covering a period of several years, surrounded and became part and parcel of the occupancy during that period, as

well as of everything connected with it. The Government was not misled, for it had fair warning during the entire non-lease period. No interest of the Government has suffered by reason of the conduct of the appellants. No rights have become vested upon the faith of their acts in the premises, and no wrong can be done by the judicial investigation and determination of the issues presented by this record. On the contrary, and as the Court of Claims has found that during the entire period of occupancy the actual rental value of the whole property was not less than \$6,000 per annum, if there should not be that judicial investigation and determination of the issues, there would be a palpable wrong done to appellants.

XII.

Receipts Given by Claimants as Payments were Made.

In Finding VI the court states that the Government occupied and used the building and basement and the appellants receipted "for rent for the same in full, except for the basement, which has been specially excluded from each of said receipts given by the claimants. With the exception of this exclusion of the basement from said receipts, it does not appear that any other protest was ever made by the claimants that said payments were not in full for the rent legally due to them for said building."

This finding will have to be taken in connection with the other findings relative to complaints and objections made by the appellants during the entire non-lease period.

The court below did not set forth the forms of any of the receipts given, although all were made part of the record and were discussed in the briefs on the trial. We cite pages 81 to 85 of that trial record. The first receipt is as follows:

Appropriation for rent of building, Department Interior, 1900:

The United States, Department of the Interior, to Hooe & Herbert, Dr.

Augst. 31, 1900. To rent of building above basement, NW. corner of 8th and E streets, for use of the Civil Service Commission for the month of Augst., 1900, \$333.33

Received at Washington, D. C., Augst. 31, 1900, of Geo. W. Evans, disbursing clerk, Department of the Interior, three hundred & thirty-three & 33/100 dollars in full of the above account.

(In duplicate.)

Hooe & Herbert,
By A. Herbert.

That was followed by monthly receipts to and including June 30, 1901, the end of that fiscal year. Each of those monthly receipts, with the exception of the dates, is exactly like the first one, above copied.

After the end of that fiscal year the payments were made annually, the first annual payment being June 30, 1902, and that receipt is as follows:

Appropriation for rent of building, Department Interior, 1902.

The United States, Department of the Interior, to Hooe & Herbert, Dr.

June 30, 1902. To rent of building (above basement) NW. corner of 8th and E street,

for use of Civil Service Commission for the
 year ending June 30th, 1902, \$4,000
 Received at Washington, D. C., June 30,
 1902, of Geo. W. Evans, disbursing clerk, De-
 partment of the Interior, four thousand dol-
 lars in full of the above account.
 (In duplicate.)

Hooe & Herbert,
 By A. Herbert.

The following year, and on the 30th day of June,
 1903, exactly the same receipt was executed, with the
 exception of the date.

The appropriation was then raised to \$4,500, as
 we have seen, and June 30, 1904, the following receipt
 was executed:

Appropriation for rent of building, Depart.
 Interior, 1904.

The United States, Department of the In-
 terior, to Hooe & Herbert, Dr.

June 30, 1904. To rent of building (above &
 exclusive of basement) NW. corner of 8th
 and E strs. for use of the Civil Service Com-
 mission for the year ending June 30th,
 1904, \$4,500.00

Received at Washington, D. C., June 30th,
 1904, of Geo. W. Evans, disbursing clerk, De-
 partment of the Interior, forty-five hundred
 dollars in full of the above account.

(In duplicate.)

Hooe & Herbert,
 By A. Herbert.

Similar receipts were executed June 30, 1905, and
 June 30, 1906, with the exception of the dates.

We have no doubt counsel for the Government will
 admit the accuracy of what has been said about those

receipts, and that we have copied them correctly from the record below.

It will be seen that these monthly receipts began, first, with a statement for the "rent of building above basement," and next that the annual receipts are for the "rent of building above basement" . . . "for one year to June 30." Following the statement of the account is the usual acknowledgment of receipt "in full of the above account." *That language is found in each and every receipt.*

It will be noticed, also, that the first receipt began as follows: "Appropriation for rent of building, Department of Interior, 1900," and that each of the other receipts began in the same way, with the exception of a change of year.

1. We think it is clear that these receipts dealt only with the appropriations, and that none of them did anything more than acknowledge payment "in full of the above account."

In *Fire Ins. Ass. v. Wickham*, 141 U. S., 564, 577, this court, through Mr. Justice Brown, said:

The rule is well established that where the facts show clearly a certain sum to be due from one person to another, a release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover the residue. If there be a *bona fide* dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim, but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole

upon payment of part will not be considered as a compromise, but will be treated as without consideration and void.

That rule was approved in *Chicago, Milwaukee & St. Paul Ry. Co. v. Clark*, 178 U. S., 353, 366, 367, and *City of San Juan v. St. John's Gas Co.*, 195 U. S., 510, 522.

We submit that the facts found show clearly that the value of the use of the entire property during the non-lease period was at least \$6,000 per annum, and that the appellants received \$4,000 per annum for a time and \$4,500 per annum for the remainder of the period. There was, then, according to the facts existing during that period, and as established by the findings of the court, at least \$6,000 due to the appellants, in justice and common right, during the period of occupancy, and according to the constitutional obligation that amount should have been paid to them. It follows that, even if there had been a release of the entire sum upon payment of a part of the amount due, such release would have been without consideration and the appellants could still sue and recover the residue.

2. Again, we submit that there was no dispute as to the amount due. The facts do not show that there was any controversy at all on that subject, and therefore there was no such dispute as could be a subject of compromise and payment of a certain sum as a satisfaction of the entire claim. The larger sum of \$6,000 is admitted to be due in justice and in common right, and has never been disputed. The circumstances of the case, as established by the findings, show that there was no good reason to doubt that the

larger sum was due, and therefore the release of the whole upon payment of a part should not be considered as a compromise, but should be treated as without consideration and void.

So, applying the facts found in this case to the rule established by the repeated decisions of this court, and considering the narrow and restricted language and nature of the receipts, it must be held, as we think, that they do not stand in the way of a recovery by the appellants.

Amount of Compensation Due.

If there had been no leases executed during the period covered by the petition, it seems that the amount due would be as follows: -

Rent of premises from August 1, 1900, to August 1, 1905, at \$6,000 per annum.....	\$30,000.00
Less amount actually received for that period.....	21,041.67
A difference of.....	<u>\$8,958.33</u>

But a lease was made for the building, exclusive of the basement, from August 1, 1900, to June 30, 1901, eleven months, at \$4,000 per annum, and another lease was made for the building, exclusive of the basement, from July 1, 1903, to June 30, 1904, one year, at \$4,500. In view of the fact that the appellants executed those leases for the building, exclusive of the basement, and received the amounts named in the leases, it may seem that they are not entitled to recover anything additional in the way

of compensation for the use of the building during those leased periods.

We are clear, however, and we respectfully submit, that appellants are entitled to recover compensation for the use of the basement during the entire period of five years, because it was excluded from the leases and from the receipts, and to recover, also, for the use of the building during the non-lease periods, over and above what they received, and up to \$6,000 per annum.

1. The court below found the annual rental value of the whole property to be.....\$6,000.00
And the annual rental value of the basement 400.00

That leaves the annual rental value of the building.....\$5,600.00

2. This puts the account in detail thus:
Rental value of basement for five years\$2,000.00
No lease for building from July 1, 1901, to June 30, 1903, two years. The rental value of the building during that time was \$11,200, and appellants received \$8,000, a difference of..... 3,200.00
No lease of building from June 30, 1904, to August 1, 1905, one year and one month. The rental value of the building during that time was \$6,066.66, and appellants received \$4,875, a difference of 1,191.66

Total due.....\$6,391.66

We submit that this court, if it should reach the conclusion that appellants are not entitled to \$8,958.33, as the total amount of just compensation, should direct the court below to render a judgment for \$6,391.66; and that even if the view of the court below should be adopted that the appellants are not entitled to recover the remainder of the value of the use of the building during any of the periods, still this court should direct the Court of Claims to render a judgment for appellants in the sum of \$2,000, that being the rental value of the basement for five years, as stated in the findings.

W. W. DUDLEY,

L. T. MICHENER,

Attorneys for Appellants.

P. G. MICHENER,

Of Counsel.

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In the Supreme Court of the United States.

October Term, 1909.

No. 183.

ROBERT A. HOOE AND ARTHUR HERBERT, APPELLANTS.

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a claim for \$9,000 for additional compensation for occupation and use by the United States Civil Service Commission of the appellants' office building during the five years beginning August 1, 1900, and ending August 1, 1905. The occupation of the main part of the building was under formal contract of lease, but the occupation of the basement was outside of any lease or agreement of any kind between the parties.

Before proceeding further with the recital of the facts as to the occupation and use in question, we

wish to call attention to the important and controlling fact that the amount of rent which could be paid for quarters for the Civil Service Commission was specifically limited by law to the amounts of the annual appropriations for that purpose, and that the full amounts appropriated for the years covered in this suit were paid to the appellants as rent for their building.

For some time immediately prior to August 1, 1900, the Civil Service Commission had office quarters and was located in the building on the *southeast* corner of Eighth and E streets northwest, Washington, D. C., the Secretary of the Interior paying for such quarters the sum of \$4,000 per year, which was the full amount appropriated by Congress for office quarters for the commission. On the 10th of July, 1900, the appellants leased and rented to the Secretary of the Interior, for the use of the Civil Service Commission, all of their said building and premises, excepting the basement thereof, together with all and singular the appurtenances thereunto belonging and appertaining, for the period commencing on the 1st day of August, 1900, and ending with the end of that fiscal year, June 30, 1901, at the rental rate of \$333.33 $\frac{1}{3}$ per month, to be paid on the last day of each and every month, this being at a rental rate of \$4,000 per year, as provided by the appropriation by Congress for quarters for the commission.

The appellants at the time of entering into said lease desired to rent the entire building to the Government, at a rental rate of \$6,000; but in view of

Congress having appropriated only \$4,000 for the rental of quarters for the commission, which it was provided should be in full for that purpose, and with the understanding that the officers of the Government would recommend that the amount of the appropriation and rental be increased to \$6,000 per year for the *entire building*, they entered into the lease for that part of the building above the basement at a monthly rate equal to the \$4,000 appropriated.

When the commission took possession under the lease on August 1, 1900, it occupied not only that part of the building covered by the lease, but also the basement of the building, and the entire building was occupied and used by the commission for the period of the five years in question, up to August 1, 1905.

This occupation and use of the basement of the building by the Civil Service Commission was wholly outside of any agreement between the officers of the Government and the appellants, and was not authorized or directed by the Secretary of the Interior, nor has any rent been paid therefor.

Claim is made by appellants for rent for this occupation and use of the basement, the claim being here based upon the provision of the fifth amendment of the Constitution, that private property shall not be taken for public use without just compensation.

As to that part of the building above the basement, a part of this five years' occupation and use of it was under formal written leases fixing the rate of rent to be paid at the rates provided and limited by law for rent

of quarters for the commission; and the remainder of the occupation was merely by holding over after the expiration of such written leases, during which rent was paid at the rate specified in the said leases for preceding years, which were also the rates provided and limited by law for quarters for the commission for the time in question.

The rent so paid the appellants throughout the whole time was received and receipted for by them, without protest, as in full payment for this part of the building.

The appellants claimed and complained throughout the whole time that they were not receiving enough rent for the building, claiming that the whole building was worth \$6,000, and at one time threatening to demand possession if this amount was not appropriated and paid them for the *entire building*, which, however, was never done by them. They now claim additional rent for this part of the building above the basement substantially upon the theory that it was worth more than they received for it, and that their complaints and threats to demand possession if the rent was not increased by Congress, constituted such a demand for possession as would change the status of the Government for the three years and one month's occupation not expressly covered by the written leases, from that of a hold-over tenant under the terms of the prior written leases, to that of a tenant under an implied contract to pay whatever the property was worth.

THE GOVERNMENT'S DEFENSES.

The Government contends that the occupation and use of the basement was not only without authority on the part of the government officers responsible therefor, but further, under the circumstances, was in effect prohibited by law, and was therefore a tort on the part of such officers, for which the Government is not liable.

On that part of the claim which is for additional rent for the remaining, or main portion of the building, there can be no recovery, for the reason that this occupation and use by the Government was governed and controlled by the terms of the express written leases between the parties, by which the rate of rent was fixed; that the appellants were paid rent for the time in question at the rate of rent so fixed; and that they received and receipted therefor, without protest, as in full payment of rent for that part of the building.

CLAIM OF RENT FOR BASEMENT.

In the court below, this part of the claim was based and prosecuted upon the theory of an implied contract (Rec., p. 11), while in the prosecution of the case here the idea of an implied contract is expressly repudiated by counsel for appellants (pp. 23-24, appellant's brief).

Of course, with the statute providing that the sums annually appropriated and which were paid appellants for rent for quarters for the commission should be in full for that purpose, there could be no

contract, either express or implied, for the payment of a greater amount for quarters for the commission.

As above indicated, appellants now admit the correctness of this contention and defense of the Government in the court below; and they now take the position that there is a right of recovery under the provision of the fifth amendment of the Constitution that private property shall not be taken for public use without just compensation, regardless of whether the occupation and use were under such circumstances as would give rise to an implied contract, and apparently also regardless of whether such occupation and use were or were not by or under competent authority on the part of the government officers or agents responsible therefor.

We contend that the temporary use and occupation of property such as the use of the basement of the building in question in this case does not come within the intent and meaning of the taking of property as contemplated by the fifth amendment. The taking referred to in the Constitution for which compensation must be made must be an absolute taking and appropriation, not a mere temporary occupation and use.

Occupation and use of basement a tort, for which no right of recovery.

But even if such temporary occupation and use be held to be within the contemplation of the provision of the fifth amendment in question, the occupation

and use here was clearly and conclusively a tort, for which there can be no right of recovery against the Government.

Such occupation and use was a tort for the reason that it not only was without any authority on the part of the government officers or agents responsible for it, but was also substantially in direct violation of law, as a consideration of the statutes bearing upon the question will show.

The first provision of law relative to the providing of quarters for the Civil Service Commission was the act of January 16, 1883, creating the commission (22 Stat. L., 403), section 4 of which provided:

That it shall be the duty of the Secretary of the Interior to cause suitable and convenient rooms and accommodations to be assigned or provided, and to be furnished, heated, and lighted, at the city of Washington, for carrying on the work of said commission and said examinations, and to cause the necessary stationery and other articles to be supplied and the necessary printing to be done for said commission.

Counsel for appellants lay much stress upon this provision of the act of 1883, claiming that under it the government officers were authorized to take and use, and therefore to bind the Government to pay for, whatever quarters they might think necessary. But, contrary to the statement of counsel for appellants (p. 10, appellants' brief), the authority of the Secretary of the Interior under the above-quoted

general provisions of the act of January 16, 1883, was qualified not only by certain other general statutes necessary to be considered in arriving at the proper construction to be placed upon said provision, but also by the subsequent annual appropriation acts making the appropriations for rent for quarters for the commission during the time in question in this suit.

At the time of the passage of said act of 1883 there were in force and effect the following general statutes, which must be considered in construing the above-quoted provision of said act and which clearly limited the power and authority of the Secretary of the Interior in the premises:

Section 3679, Revised Statutes:

No department of the Government shall expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year or involve the Government in any contract for the future payment of money in excess of such appropriations.

Section 3732, Revised Statutes:

No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year.

Act of June 22, 1874 (18 Stat. L., 144):

And hereafter no contract shall be made for the rent of any building or part of any building in Washington, not now in use by the Government, to be used for the purposes of the Government until an appropriation therefor shall be made in terms by Congress.

Act of March 3, 1877 (19 Stat. L., 370):

And hereafter no contract shall be made for the rent of any building or part of any building to be used for the purpose of the Government in the District of Columbia until an appropriation therefor shall have been made in terms by Congress, and that this clause be regarded as notice to all contractors or lessors of any such building or part of building.

But outside of the above *prior* statutes, we have the general power and authority conferred upon the Secretary of the Interior by said provision of the act of 1883 conclusively qualified and limited by a provision in each of the appropriation acts covering the time for which rent is claimed, specifically restricting the Secretary's power to within the amounts therein appropriated for rent for quarters for the commission.

The introductory paragraph of each of the appropriation acts in question specifically provided that the sums therein appropriated should be *in full compensation* for the objects and purposes for which they were appropriated, the language of the provision being as follows:

That the following sums be, and the same are hereby, appropriated out of any money

in the Treasury not otherwise appropriated, in full compensation for the service of the fiscal year * * * for the objects hereinafter expressed. (31 Stats. L., 86, 960; 32 id., 120, 854; 33 id., 85, 631.)

And further, the last section of each of these appropriation acts specifically provides that all laws or parts of laws inconsistent with the act are repealed (31 Stats. L., 134, 1009; 32 id., 171, 906; 33 id., 142, 688); hence if there had been any prior provision of law which might otherwise have seemed to allow the Secretary of the Interior power to exceed the amounts appropriated for rent of quarters for the commission, notwithstanding the above-quoted provision as to the amounts appropriated being *in full compensation*, this repealing clause in each of said acts would have the effect of repealing any such prior provision of law, thus leaving said provision as to *compensation in full* in full force and effect.

It is therefore clear that the Secretary of the Interior, in providing quarters for the commission, was restricted by law to the amounts of the annual appropriations therefor, and that he was absolutely without authority or power to rent, or to take and use, any quarters for the commission which would involve the Government for the payment of any amount of rent in excess of the amounts so appropriated.

We have so far discussed this case as though the occupation and use of the basement of the building had been authorized by the Secretary of the Interior, who was the only officer or agent of the Government

having any power or authority under the statutes to provide quarters for the commission. But it appears from the record (p. 12) that the occupation and use was never authorized or directed by him (Rec., pp. 8, 12), but was solely by his subordinate officers of the department, the officers of the Civil Service Commission, who at no time had any authority whatever to provide quarters for the commission. The record shows that the Secretary, recognizing the limitation of his authority in the premises to the amounts appropriated, refused the requests made by the appellants that the basement be rented for the use of the commission. (Finding IV, Rec., p. 8.)

It thus appears that the occupation and use of the basement was doubly without authority. But even if such occupation and use had been under the direction of the Secretary himself, the result would be the same, since, as above shown, he had no authority whatever to authorize the taking and using of any quarters for the commission in addition to those for which the full amounts of the appropriations were being paid.

GOVERNMENT NOT LIABLE FOR UNAUTHORIZED ACTS
OF ITS OFFICERS OR AGENTS.

It would seem to be too well established by the decisions of this court to admit of reasonable controversy, that the Government is not liable to individuals for the misfeasance or unauthorized exercise of power by its officers and agents; that it is bound only by such of their acts as come within the just exer-

cise of their official powers, and is not bound, nor liable for, such of their acts as are beyond their authority; that individuals, as well as the courts, must take notice of the extent of the authority of such public agents; and that wrongs or injuries resulting from unauthorized acts or exercises of power by them are torts, for which there can be no recovery.

In *Bank of United States v. Owens* (2 Pet., 527, 539), this court said:

Courts are instituted to carry into effect the laws of the country. How can they then become auxiliary to the consummation of violations of law? To enumerate here all the instances in which this reasoning has been practically applied would be to incur the imputation of vain parade. There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal.

In the case of *Johnson v. United States* (5 Mason, 441), Mr. Justice Story said:

I hold it most clear that the acts of a public officer beyond the scope of his power and in violation of his public duties are, in such cases at least, utterly void. A different doctrine would lead to the most alarming and mischievous consequences and unsettle some of the best established principles of agency.

In the case of *Hunter v. The United States* (5 Pet., 173, 187) this court said:

If in violation of his duty an officer shall knowingly, or even corruptly, do an act injurious to the public, can it be considered

obligatory? He can only bind the Government by acts which come within a just exercise of his official power.

In *Gibbons v. United States* (8 Wall., 269, 274), which was an appeal from the Court of Claims on an action brought to recover money alleged to have been wrongfully exacted by a quartermaster of the United States in the execution of a contract for the delivery of quartermaster supplies, the court said:

But it is not to be disguised that this is an attempt, under the assumption of an implied contract, to make the Government responsible for the unauthorized acts of its officer, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents. In the language of Judge Story, "it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests. * * *"

The language of the statutes which conferred jurisdiction upon the Court of Claims excludes by the strongest implication demands against the Government founded on torts. The general principle which we have already stated as applicable to all governments forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of

official duties. * * * These reflections admonish us to be cautious that we do not permit the decisions of this court to become authority for the righting in the Court of Claims of all wrongs done to individuals by the officers of the General Government, though they may have been committed while serving that Government and in the belief that it was for its interest.

In *Filor v. The United States* (9 Wall., 45, 48) suit was brought in the Court of Claims to recover rent for property occupied and used by the Quartermaster's Department of the Army at Key West, Fla., under a lease made by the acting assistant quartermaster by direction of the military commander at that station, and which lease had not been approved by the Quartermaster-General of the Army. And here it is to be noted that this case was very similar to the case at bar though much stronger against the Government, since there *was authority*, there, in the responsible officer of the Government, the Quartermaster-General, for the leasing of such quarters, while here there was no authority in the Secretary of the Interior or any other government officer for the leasing or occupation and use of the basement in question. In delivering the opinion of this court, affirming the judgment of the Court of Claims dismissing the claimant's petition, Mr. Justice Field said:

We do not find in any regulation of the army or in any act of Congress that the acting assistant quartermaster at Key West was

invested with power to bind the United States to the agreement or lease produced, even though his action was taken by direction of the military commander at that station and the instrument was approved by him. No lease of premises for the use of the Quartermaster's Department, or any branch of it, could be binding upon the Government until approved by the Quartermaster-General. Until such approval the action of the officers at Key West was as ineffectual to fix any liability upon the Government as if they had been entirely disconnected from the public service. The agreement or lease was, so far as the Government is concerned, the work of strangers.

In *Whiteside v. The United States* (93 U. S., 247, 256-257) the case turned on this question of whether or not the Government was liable for the unauthorized acts of its agents, and in the course of its opinion deciding the question in the negative this court said:

Different rules prevail in respect to the act and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principals, in the latter category, are in many cases bound by the acts and declarations of their agents, even where the act or declaration was done or made without any authority, if it appear that the act was done or declaration was made by the agent in the course of his regular employment; but the Government or public authority is not bound in such a case, unless it manifestly appear that the agent was acting within the scope of his

authority, or that he had been held out as having authority to do the act or was employed in his capacity as a public agent to do the act or make the declaration for the Government. Although a private agent acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public.

Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act.

Of like effect are the decisions of this court in the cases of *Hart v. United States* (95 U. S., 316, 318); *Hawkins v. United States* (96 U. S., 689, 691); *Langford v. United States* (101 U. S., 341); *Moffatt v. United States* (112 U. S., 24, 31); *Camp v. U. S.* (113 U. S., 648, 653); *German Bank v. United States* (148 U. S., 573, 579).

In *Hume v. United States* (132 U. S., 406, 414), in which this question was involved, Mr. Chief Justice Fuller, in delivering the opinion of the court, said:

In order to guard the public against losses and injuries arising from the fraud or mistake or rashness or indiscretion of their agents, the

rule requires all persons dealing with public officers, the duty of inquiry as to their power and authority to bind the Government; and persons so dealing must necessarily be held to a recognition of the fact that government agents are bound to fairness and good faith as between themselves and their principal.

While the decisions of the court in the cases so far cited by us were based on the law as it stood prior to the passage of the act of March 3, 1887 (24 Stat. L., 505), by which the Court of Claims was for the first time expressly given jurisdiction of claims against the Government "founded upon the Constitution;" yet since the passage of this act, the principle in question; that is, that the Government is not liable for the tortious acts of its officers or agents, has been held to apply, and to bar a recovery, the same in cases *founded upon the Constitution*, as in cases based upon implied contract, independent of the Constitution.

In the case of *Hill v. United States* (149 U. S., 593, 597-598) suit was brought to recover for the occupation and use by the United States, for light-house purposes, of certain property claimed by the plaintiff, *the suit being specifically based upon this provision of the fifth amendment of the Constitution that private property should not be taken by the United States for public use without just compensation*. The case was remanded to the court below for dismissal for want of jurisdiction; and in delivering the opinion of this court Mr. Justice Gray said:

The whole effect of the act of March 3, 1887 (c. 359), under which this suit was brought,

was to give the Circuit and District Courts of the United States jurisdiction, concurrently with the Court of Claims, of suits to recover damages against the United States, in cases not sounding in tort. (*United States v. Jones*, 131 U. S., 1, 16, 18.)

The United States can not be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. Nor can the settled distinction, in this respect, between contract and tort, be evaded by framing the law as upon an implied contract. (*Gibbons v. United States*, 8 Wall., 269, 274; *Langford v. United States*, 101 U. S., 341, 346; *United States v. Jones*, above cited.)

An action in the nature of assumpsit for the use and occupation of real estate will never lie where there has been no relation of contract between the parties, and where the possession has been acquired and maintained under a different or adverse title, or where it is tortious and makes the defendant a trespasser. (*Lloyd v. Hough*, 1 How., 153, 159; *Carpenter v. United States*, 17 Wall., 489, 493.)

And in *Schillinger v. United States* (155 U. S., 163), it is so clearly and conclusively settled by the opinion of this court that the provision of the act of March 3, 1887, giving the Court of Claims jurisdiction of claims founded upon the Constitution creates no liability or right of recovery where the claim is based upon a tortious act of a government officer or agent, as to leave absolutely no room for the appellant's contention.

In the Schillinger case, which was on appeal from the Court of Claims, claim was made *under the fifth amendment* for compensation for the alleged use of Schillinger's patent, which had been neither authorized, admitted, nor recognized by the government officers; and in delivering the opinion of the court, affirming the decision of the Court of Claims dismissing the claimant's petition, Mr. Justice Brewer, after citing the different statutes conferring the jurisdiction of the Court of Claims, including the said act of March 3, 1887, said (p. 167):

Under neither of these statutes had or has the Court of Claims any jurisdiction of claims against the Government for mere torts; some element of contractual liability must lie at the foundation of every action. In *Gibbons v. United States* (8 Wall., 269, 275) it was said: "The language of the statutes which confer jurisdiction upon the Court of Claims excludes by the strongest implication demands against the Government founded on torts. The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties." And again, in *Morgan v. United States* (14 Wall., 531, 534): "Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on the wrongful proceedings of an officer of the Government."

The rule thus laid down has been consistently followed by this court in many cases up to and including the recent case of *Hill v. United States* (149 U. S., 593, 598).

If there was any error in this interpretation, first announced in 1888, of the scope of the act, and if it was the intent of Congress to grant to the court jurisdiction over actions against the Government for torts, an amending statute of but a few words would have corrected the error and removed all doubt. While the language of the act of 1887 is broader than that of 1855, it is equally clear in withholding such jurisdiction. It added, "all claims founded upon the Constitution of the United States," but that does not include claims founded upon torts, any more than "all claims founded upon any law of Congress" found in the prior act. The identity of the descriptive words excludes the thought of any change.

It is said that the Constitution forbids the taking of private property for public uses without just compensation; that therefore every appropriation of private property by any official to the uses of the Government, no matter however wrongfully made, creates a claim founded upon the Constitution of the United States and within the letter of the grant in the act of 1887 of the jurisdiction to the Court of Claims. If that argument be good, it is equally good applied to every other provision of the Constitution as well as to every law of Congress. This prohibition of the taking of private property for public use

without compensation is no more sacred than that other constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. Can it be that Congress intended that every wrongful arrest and detention of an individual, or seizure of his property by an officer of the Government, should expose it to an action for damages in the Court of Claims? If any such breadth of jurisdiction was contemplated, language which had already been given a restrictive meaning would have been carefully avoided.

And again, in *Bigby v. United States* (188 U. S., 400, 407), Mr. Justice Harlan, after a clear and comprehensive discussion of the leading cases on this question, in delivering the opinion of the court, said:

It thus appears that the court has steadily adhered to the general rule that, without its consent in some act of Congress, the Government is not liable to be sued for the torts, misconduct, misfeasance, or laches of its officers or employees. There is no reason to suppose that Congress has intended to change or modify that rule. On the contrary, such liability to suit is expressly excluded by the act of 1887.

And after referring to certain cases in which the court sustained the right of recovery against the Government, among which were the cases of *United States v. Russell* (13 Wall., 623) and *United States v. Great Falls Company* (112 U. S., 645), which are cited and strongly relied upon by counsel for appellants to establish a right of recovery in the case at bar,

Mr. Justice Harlan strikes the keynote and makes clear the essential fact necessary to sustain a right of recovery when he says (p. 408):

The important fact in each of those cases was that the officers who appropriated and used the property of others were authorized to do so.

And so in the *Lynah case* (188 U. S., 445), and in all other cases cited by counsel for claimant in which a right of recovery was sustained against the Government, there was this important and necessary fact of the action of the government officers in the premises being supported by proper authority and power on their part.

And this is the point on which the case at bar turns. There was no power or authority either in the officers of the Civil Service Commission or in the Secretary of the Interior to appropriate the appellant's basement for occupation and use by the Civil Service Commission; and of this fact the appellants were fully informed, though it is immaterial whether they did or did not have actual knowledge of the fact, since it was a matter of law, as to which their knowledge is presumed.

And here we wish to call especial attention to the fact that the appellants were in no wise misled in the matter as to a right to compensation for the use of the basement of the building, since, as stated by Judge Barney in delivering the opinion of the Court of Claims (Rec., p. 13):

The facts in the present case show that the claimants had actual as well as presumptive

notice of the extent of the authority of the Secretary of the Interior to enter into a contract for rent for the Civil Service Commission; for during the whole period they persistently complained of the small amount which Congress was appropriating for that purpose.

In fact, the opening paragraph of each of the written leases in this case shows a recognition by all parties of the source of authority to contract for rent for the Civil Service Commission. * * *

This recognition was evidenced by citing as authority to contract for rent the act of Congress making the appropriation for the respective years in question.

As further evidence on this point we have the additional facts of the withholding of the basement from the lease, the occupation of it by the commission without any contract therefor, the action on the part both of the Secretary of the Interior and of appellants in trying to induce Congress to appropriate a greater amount for rent of quarters for the commission, so that the basement could be rented, together with the refusal of Congress to sufficiently increase the appropriation for the purpose in question. The claimants knew the amount of the appropriation for each year, that it was all being expended under the terms of their lease with the Government for the *main* part of the building, and that therefore neither the officers of the commission nor the Secretary of the Interior could legally contract or bind

the Government to pay rent for the basement of the building.

A decision sustaining the appellants' demand for recovery would place any executive officer of the Government above Congress and the law in the important function of the expenditure of governmental funds for public purposes.

As stated by Judge Barney, in the opinion of the court below:

Under the Constitution Congress holds the purse strings of the Government, and we do not think that by evasion or indirection any officer of the Government can deprive that body of this important privilege. Mr. Justice Story, in his Commentaries on the Constitution, in discussing this privilege of Congress, said: "The power to control and direct the appropriations constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public speculation." (2 Story Com., sec. 1348.)

To hold that the Civil Service Commission can take possession of the whole of a building, a part of which has been rented for its use pursuant to an act of Congress, and make the Government liable for this additional expense, would be equivalent to saying that Congress is powerless in limiting the expenses of the Government. Under such a holding, the Civil Service Commission might have "swarmed" into possession of the whole block in which

they were located and involved the Government in payment for the rent of the same. Such a ruling would place the Treasury of the Government at the mercy and convenience of every one of its officers. We have been cited to no authority sustaining such a conclusion, and do not believe it to be the law.

A construction of law and judgment in favor of the appellants on this part of the claim would, as the court will readily perceive, mean the opening up of an easy avenue for endless collusion, conspiracy, and fraud against the Government, not only in this particular line, but also in other lines of the expenditure of public moneys. Hence, if there were no other defense, the petition should be dismissed on the ground that a construction of the law and judgment in favor of the appellants would be most decidedly and dangerously against public policy. (Page on Contracts, sec. 326; *Randall v. Howard*, 2 Black., 585; *Hannay v. Eve*, 3 Cr., 242; *Woodstock Iron Co. v. Exten. Co.*, 129 U. S., 643; *Gibbs v. Gas Co.*, 130 U. S., 408.)

We have deemed it necessary to consider the authorities somewhat at length by reason of the earnest and insistent position taken by counsel for appellants in urging the contrary view of the case, though as we construe the law and the decisions of the courts the appellants are clearly and conclusively without any right of recovery on this claim for occupation and use of the basement of the building.

**CLAIM FOR ADDITIONAL RENT OF BUILDING ABOVE
BASEMENT.**

Claim is made for additional rent for the main part of the building—that is, all of the building above the basement—the amount of the claim being \$1,500, according to the allegations of the petition, though increased here to nearly three times this amount. No recovery, however, can be had on this item of the claim, for the following reasons:

First. The amount of rent that could be paid for quarters for the commission was fixed and *expressly limited* by law to the amount which the appellants were paid for this part of their building.

Second. The appellants received the payment of this amount of rent for the full time in question, and receipted for the same, without protest, *as in full* of their account for rent therefor.

Third. The occupation of this part of the building each year of the five years' time in question was either directly under a formal written contract which specified the rental rate, or was a "hold-over" occupation under the terms of such a prior written contract, and the claimants have been paid the full amount of rent due at the rate specified in such contracts.

Time expressly covered by written contracts.

The five-year occupation in question may be divided into two classes, viz, that which *was*, and that which was *not*, expressly covered by the written contracts.

The occupation *expressly* covered by the contracts consists of the eleven months from August 1, 1900, to July 1, 1901, covered by the contract of July 10, 1900, and the one year from July 1, 1903, to July 1, 1904, covered by the contract of August 18, 1903, making a total of one year and eleven months.

The occupation *not* expressly covered by the contracts consists of the two fiscal years from July 1, 1901, to July 1, 1903, immediately following the eleven months' occupation covered by the contract of July 10, 1900, and the one year and one month from July 1, 1904, to August 1, 1905, immediately following the one year's occupation covered by the contract of August 18, 1903, which makes a total of three years and one month *not expressly* covered by the written contracts.

Notwithstanding the suggestion of counsel for appellants to the contrary (pp. 37, 39, appellants' brief), it is so clear and conclusive that no recovery can be had for additional rent on account of the one year and eleven months expressly covered by the two written contracts as to need no supporting argument, since the contracts themselves specified the rate of rent to be paid, and the claimants have been paid and have receipted for the rent *as in full*, at the rate specified in the contracts.

Time not expressly covered by the contracts.

The contention of counsel for appellants as regards this claim for additional rent for the main part of the building would seem to be that this occupancy

of three years and one month not *expressly* covered by the written contracts was not under the terms of any agreement whatever as to rate of rental; that such occupancy therefore created an implied contract for the payment by the Government of a fair rental rate; and that the rent paid by the Government for this period of three years and one month was less, by the amount claimed, than the fair rental value of the property.

As already stated, there can be no recovery of additional rent for the time in question for three reasons, either of which is a complete defense against recovery, and which we will now consider.

Implied obligation for additional rent could not arise.

The same defense presented by us against the claim of rent for the basement of the building applies with equal force against this claim for additional rent for this part of the building above the basement—that is, that the rate of rent that could be paid for quarters for the commission being expressly limited by law to the amounts appropriated by Congress and paid the appellants, no implied obligation could arise, *in the face of this express prohibition of the statutes*, to pay a greater amount than was provided by the appropriations for rent for the commission.

Receipt in full, without protest.

For this part of the building the appellants received full payment of rent at the rate specified in the express contracts, and they receipted for the same *as in full payment*, without protest (Finding VI, Rec. p.

9, also p. 11 id.); and as such receipt of payment, without protest, is conclusive against a claim for additional pay, there can be no recovery of additional rent even if it should be held that the tenancy was under implied contract, entirely independent of the express contracts, instead of a hold-over tenancy, under the terms and conditions of the preceding express contracts. (*United States v. Childs*, 12 Wall., 232; *Francis v. United States*, 96 U. S., 354, 359-360; *Murphy v. United States*, 104 U. S., 464; *De Arnaud v. United States*, 151 U. S., 483; *Garlinger v. United States*, 169 U. S. 316, 322-323; *Chicago, Milwaukee & St. Paul Ry. Co. v. Clark*, 178 U. S., 353, 368-369; *Newman v. United States*, 81 Fed. Rep., 122.)

In the *De Arnaud* case (*supra*), this court, in discussing the effect of a receipt in full, said:

In the absence of allegation and evidence that this receipt was given in ignorance of its purport, or any circumstances constituting duress, it must be regarded as a quittance in bar of any demand.

In the *Garlinger* case the court held the claimant concluded merely upon his acceptance of the payments made him, without his having receipted for the same as in full payment. In the course of its opinion the court said:

We do not want to be understood as saying that the mere fact of receiving money in payment will estop a creditor. But where, as in this case, the payments were made frequently, through a considerable period of

time, and were received without objection or protest, and where there is no pretense of fraud, or of circumstances constituting duress, it is legitimate to infer that such payments were made and received with the understanding of both parties that they were in full. Such a presumption is very much strengthened by the lapse of two years before the appellee thought fit to make any demand.

These views sufficiently dispose of the case, and render it unnecessary to consider the other contentions urged on behalf of the Government.

As to the cases of *Fire Insurance Association v. Wickham* (141 U. S., 564), *Chicago, Milwaukee & St. Paul Ry. Co. v. Clark* (178 U. S., 353), and *City of San Juan v. St. Johns Gas Co.* (195 U. S., 510), cited by counsel (pp. 35-36, appellants' brief), as against such receipts in full being held conclusive, these decisions do not support the appellants' contention on this point.

Referring to the statement in the quotation by counsel from the opinion in the first of these cases, that the rule is well established that where the facts show *a certain sum to be due* part payment of that sum will not release the debtor for the whole debt, we will say that this rule does not apply here, for the reason that in the case at bar no *certain sum* greater than the amount of rent paid the appellants is shown *to have been due*.

And again, as to the statement in the opinion to the effect that where there is a dispute as to the

amount due, the payment of a smaller amount than the amount claimed, *in the way of a compromise* would be conclusive; but that where the larger sum *is admitted to be due*, or where the circumstances of the case show that there is no good reason to doubt that it is due, the payment of a less amount would not be conclusive. This part of the opinion can have no application here, for the reason that no "larger sum" is or was ever *admitted to be due*, notwithstanding the statement of counsel for appellants to the contrary (p. 36, appellants' brief). The findings of fact do not, nor did the evidence in this case, show any admission on the part of the Government or any of its officers that any greater amount was due for rent for this part of the building than that which was paid the appellants for it. And, further, the appellants never claimed, during the time in question, that any greater amount was *due* than was paid them, though they *did* claim that it was *worth*, and that they *ought to have*, more than they were receiving for it.

Of course there was no compromise, as counsel for appellants say, and for this very reason, that the appellants never during the time, or at any time of the occupation and payment of the rent, claimed any more rent *to be due* than was paid them.

As to the second of these cases cited by counsel for claimant, *Chicago, Milwaukee and St. Paul Ry. Co. v. Clark* (178 U. S., 353), both the opinion in this case and the authorities therein cited conclusively support our contention here on the facts in the case at

bar instead of the appellants' contention. In that case Mr. Chief Justice Fuller, after a clear and concise discussion of the authorities on the subject, said (pp. 368-369):

Without analyzing the cases, it should be added that it has been frequently ruled by this court that a receipt in full must be regarded as a quittance in bar of any further demand in the absence of any allegation and evidence that it was given in ignorance of its purport, or in circumstances constituting duress, fraud, or mistake. (*De Arnaud v. United States*, 151 U. S., 483; *United States v. Garlinger*, 169 U. S., 316, 322; *United States v. Adams*, 7 Wall., 463; *United States v. Child*, 12 Wall., 232; *United States v. Justice*, 14 Wall., 535; *Baker v. Nachtrieb*, 19 How., 126.)

In the case at bar there is a total absence of any allegation or evidence of these receipts in full having been given by the appellants either *in ignorance of their purport*, or *in circumstances constituting duress, fraud, or mistake*, hence there is no ground upon which to base a denial of their conclusiveness as a final settlement.

We submit that this defense of receipt of payment *as in full*, under the circumstances in this case, constitutes a complete defense and bar to any recovery whatever on this item of additional rent for the main part of the building.

Government a hold-over tenant under terms of express contracts, and appellants paid in accordance therewith.

The position of the Government is that during the three years and one month's tenancy not expressly covered by the two written leases between the parties, the Government was a hold-over tenant under the terms of the written leases for preceding years, which leases determined the rate of rent to be paid during such hold-over tenancy, and at which rate the appellants have been paid rent for the time in question. The facts in this connection are, in brief, substantially as follows (Findings III and IV, Rec., pp. 7-9):

Upon the expiration of the first written lease, that of July 10, 1900, for the last eleven months of the fiscal year ending June 30, 1901, the Civil Service Commission continued in possession and use of the building, and the Secretary of the Interior a short time thereafter wrote the appellants proposing a renewal of said lease for the then fiscal year ending June 30, 1902, the appropriation by Congress for that year being the same as for the preceding year; that is, \$4,000. The appellants replied that they were unwilling to *bind* themselves to rent the building for *another year* at the rate of \$4,000, and that they could not with justice to themselves rent the *entire building*, including the basement, for less than \$6,000; and no further action was taken by either party for that year, rent being paid at the rate specified in the

lease for the preceding year, which was the full amount of the appropriation.

For the fiscal year ending June 30, 1903, the Secretary of the Interior recommended to Congress an increase to \$6,000 for rent for the commission, and appellants' agent informed both the Secretary and Congress that if this amount was not provided for rent for the *entire building*, possession would be demanded. Congress, however, refused to increase the appropriation, and no further action was taken by either party as to increase of rent or termination of the tenancy, the occupancy of the commission being continued throughout the year, and rent being paid therefor at the same rate as for the preceding years; that is, at the rate of the \$4,000 appropriated and limited by Congress.

For the fiscal year ending June 30, 1904, the Secretary of the Interior renewed his recommendation for an increase to \$6,000, and for this year Congress increased the appropriation to \$4,500, and the Secretary wrote the appellants proposing renting the *entire building* for the \$4,500 provided by the appropriation, which, however, the appellants refused to do, and a written lease was again entered into for all the building *except the basement* for that fiscal year, at the rate of the \$4,500 appropriated, which rate of rental was paid the appellants.

When the period covered by the above-noted lease expired, on June 30, 1904, the commission continued in the possession and use of the building without any further action on the part of either party until

November 15, 1904, when the Secretary of the Interior wrote the appellants proposing for that fiscal year an express renewal of the preceding year's lease for the \$4,500 which had again been appropriated by Congress. The appellants took no action in response to this proposal further than to write the Secretary requesting that the basement be included in the lease at a rental rate of 30 cents per square foot of its floor space, to which suggestion the Secretary made no response, and no further action was taken in the matter, the occupation continuing throughout the year and rent being paid therefor at the rate of the \$4,500 provided and limited by the appropriation, and specified in the written lease for the preceding year.

The appropriation for the next fiscal year was again \$4,500 and the commission, without any express renewal of the preceding lease, or further action by either party, continued in the possession and use of the building for the month up to August 1, 1905, for which appellants were paid rent at the rate of \$4,500 provided by the appropriation and by the preceding lease.

It is well settled that where a tenant holds over after the expiration of a written contract, or lease, the law implies that he holds over subject to and upon the terms of such lease, and that the rights of the parties are controlled by the contract under which the entry was made. As stated in the opinion of the court below, "It is elementary that where the landlord suffers the tenant to remain in possession

after the expiration of his lease the law presumes the holding to be upon the same terms as the written lease under which the entry was made." (Taylor's Landlord and Tenant, sec. 525; Jones on Landlord and Tenant, secs., 201, 555; American and English Encyclopedia of Law, 2d Ed., vol. 18, p. 407; *Dermott v. Tucker*, 3 Cranch, C. C., 92; *Baker v. Root*, 4 McLean, U. S., 572; *Hall v. Myers*, 43 Md., 446; *Hobbs v. Batory*, 86 Md., 68; *Lovett v. United States*, 12 Ct. Cls. 67, 84; *Salisbury v. Hale*, 12 Pick., 332.)

Therefore, when the Government continued its occupancy after the expiration, on June 30, 1901, of the eleven months' lease of July 10, 1900, under which entry was made, it became a hold-over tenant under the terms of this lease for the preceding year, and so continued for the succeeding two years, up to July 1, 1903, the beginning of the fiscal year covered by the new written lease of August 18, 1903, for and during which two years the rate of rental was fixed and governed by the terms of the original lease of July 10, 1900, under which the entry was made.

And, likewise, when the Government's occupancy continued after the expiration, on July 1, 1904, of the one year's occupancy under the new lease of August 18, 1903, by which the annual rental rate was increased from \$4,000 to \$4,500 in accordance with the increase of the annual appropriation for quarters for the commission, the Government again became a hold-over tenant subject to and upon the terms of this new written lease, and so continued during the

remaining one year and one month of the time in question.

Nothing could have put the Government in any other position than that of a hold-over tenant under the terms and conditions of these express contracts of lease except a legal demand for possession, or notice to quit, and no such demand or notice was ever served or made on the Government.

There is an attempt in behalf of appellants to make it appear that such a demand was made on the Government, but the record absolutely fails to sustain any such contention.

The record *does* show that the appellants resorted to all available means of securing an increase of rent for the building—including *threats to demand possession* if Congress did not increase the rent—but it also shows clearly that they nevertheless wanted to keep the Government as a tenant, even if they could not secure an increase of rent, and that their action always stopped short of a notice to quit or demand for possession.

The facts relied upon by the appellants to sustain this contention that the three years and one month's occupation not *expressly* covered by the two written contracts of lease are apparently as follows:

First, that the appellants claimed and urged that the entire building was worth \$6,000 per year, and that the Government ought to pay them that amount of rent for it. However, this fact does not savor in the least of any demand for possession.

Second, that when the Secretary of the Interior, shortly after the expiration of the time covered by the first written lease, wrote the appellants proposing a renewal of said lease for the then succeeding fiscal year, they wrote him in reply that they were unwilling to bind themselves to rent the building "for another year" at the rate of \$4,000 per annum, and that they could not, with justice to themselves, rent the entire building, including the basement, at a rental of less than \$6,000 per annum. This fact, however, utterly fails to show any demand for possession, the appellants merely stating that they were unwilling to *bind* themselves to rent the building, exclusive of the basement, for *another year* at the rate of the \$4,000 they had been receiving for it, and which was the amount appropriated by Congress for that year. This clearly meant nothing more than that while they were not satisfied with the rate of rent they were receiving, yet they were willing to allow the Government to remain at the old rate rather than to lose it as a tenant, though they were not willing to enter into a renewal of the lease *for the full year*. They evidently thought this course might aid in inducing Congress to increase the rent, and also this would leave it open to them to terminate the tenancy on thirty days' notice in case an opportunity should present itself for renting the *entire building* and at a better rate of rental. (*Spalding v. Hall*, 6 D. C., 123; District of Columbia Code of 1902, secs. 1034, 1221.) In no view of the case can this letter be construed as a demand for possession. And further, it is to be noted that this correspondence

between the Secretary and the appellants took place some time after the beginning of the fiscal year, so that the Government was then, and had been for some time, a hold-over tenant under the terms of the written lease for the preceding year.

Third, that upon the failure of the House of Representatives to increase the appropriation for rent of quarters for the commission for the fiscal year ending June 30, 1903, to \$6,000, as recommended by the Secretary of the Interior, the agent of the appellants informed the chief clerk of the department, the United States Senate, and the Committee on Appropriations of the House of Representatives *that unless this estimate or recommendation of \$6,000 by the Secretary of the Interior was restored by the Senate he was instructed by the appellants to ask for possession of said property at the earliest convenient time, and that possession would be demanded unless an appropriation of \$6,000 was made for rental of the entire building.* It is perfectly clear, however, that in all this there was in no sense a demand for possession, as this action by appellants' agent did nothing more than merely convey the information that he had been instructed to ask for possession *at the earliest convenience* of the Civil Service Commission, *in case Congress should not finally make an appropriation of \$6,000 for the entire building.* That a statement of what the appellants *intended* to do *if Congress did not increase the rent* constitutes a notice to quit, or demand for possession, is such a groundless proposition that it calls for no argument in refutation.

Fourth, on November 15, 1904, following the expiration of the second written lease, covering the fiscal year ending June 30, 1904, the Secretary of the Interior wrote the appellants proposing a renewal of said lease for the then fiscal year, ending June 30, 1905, at the rate of \$4,500 per annum appropriated by Congress, and upon this proposal appellants took no action further than to write the Secretary requesting that the basement of the building be included in the lease at a rate of 30 cents per square foot of its floor space. This action on the part of appellants is so devoid of even a suggestion of a demand for possession that it calls for no discussion. And here, again, we have the fact that at the time of this correspondence between the Secretary of the Interior and the appellants, the status of the Government as a hold-over tenant under the terms of the prior lease had been fixed by a hold-over occupancy of more than four months, without any objection or protest on the part of the appellants.

To be a legal and sufficient notice to quit, a notice must be explicit and positive in terms, it must specify the time for the tenant to quit, and it must be such that the tenant may safely act on it at the time of receiving it; and it is therefore clear that at no time during the entire period of the occupancy involved in this claim was there any demand for possession or notice to vacate. But if there had been, it would make no difference, for the reason that the appellants' acceptance of the rent due, at the end of each

year of the occupancy, would constitute a waiver of any such demand or notice. (Jones on Landlord and Tenant, sec. 271; *Collins v. Canty*, 6 Cush., Mass., 415; *Murphy v. Little*, 69 Vt., 261.)

True, there might be circumstances where the rate of rent would be increased by the action of the parties, though the tenancy was a hold-over tenancy in accordance with all of the other provisions of the preceding express contract; but such was not the case here, for while it is held by some authorities that a notice to a tenant before the termination of the lease that he must pay an increased rent if he holds over is usually accepted—that is, the increased rent is agreed to—by the tenant's continuance in possession or by his mere silence; yet, on the other hand, if the tenant *manifests his dissent* to the landlord's proposed increase of rent, then no privity of contract will be created for the increased rent, and the hold-over tenancy will be considered to be at the rate of rent specified in the lease under which he previously held possession. The rent can not be increased except by consent of the tenant either express or implied. In such case the landlord's remedy would be to oust the tenant from possession. (Jones on Landlord and Tenant, sec. 267; *Hunt v. Bailey*, 39 Mo., 267; *Galloway v. Kerby*, 9 Ill., App., 501; *Atkinson v. Cole*, 16 Colo., 83.)

As to the case of *Semmes and Barber v. United States*, 26 Cls. 119 cited and strongly relied upon by counsel (pp. 18–21, appellants' brief), the case is not in

the least in point here, as there are the following important and controlling differences between the facts there and here.

In that case there was not, as here, an express limitation by law of the amount that could be paid for the property, to the amount that was paid by the government officers for it.

There the question of receipt in full did not enter into the case, as it does here.

And, finally, in that case the Government was given notice to quit at a specified future date unless it was willing to pay the increased rate of rent demanded, while in the case at bar no such demand or notice to quit, was given, though numerous complaints and a *threat* to demand possession were made by the appellants. And so, if there had been here, as there, no statutory limitation of the amount of rent that could be paid, and also such a demand, or notice that increased rent must be paid if the Government held over or continued in possession, it might have been sufficient to have made the Government liable for the increase so demanded.

However, in the case at bar there was no such notice, or intimation of any kind, from the appellants to the Government *either before or after the expiration of the respective written leases* that additional rent would be required for that part of the building covered by the leases if the Government continued in possession. But if there *had* been such notice, there was not only no acquiescence or agreement, either express or implied, on the part of the Gov-

ernment, for an increase of the rent over the contract rates, but there was, on the other hand, *express dissent by the Government*, speaking through its principal agent, Congress, in the refusal of Congress to appropriate for the increases proposed and recommended to Congress by the Secretary of the Interior and urged upon Congress by the appellants.

And, further, if there *had* been any such notice, the subsequent acceptance by the appellants, *as in full payment*, of the amount of money appropriated for each year, would constitute a waiver of the notice. (Jones on Landlord and Tenant, secs. 204, 271; *Colins v. Canty*, 6 Cush., Mass., 415.)

As a matter of fact, none of the objections made by the appellants were really against the amount of rent paid for *this* part of the building—that is, that part above the basement, and which was covered by the leases—but were against the use of the basement along with it for less than \$6,000 for the *entire building*; hence the objections were really against the use of the *basement* without additional compensation, and have no bearing upon this item of additional rent for the building *above the* basement.

In the concise and forcible language of the opinion of the court below (Rec., p. 11):

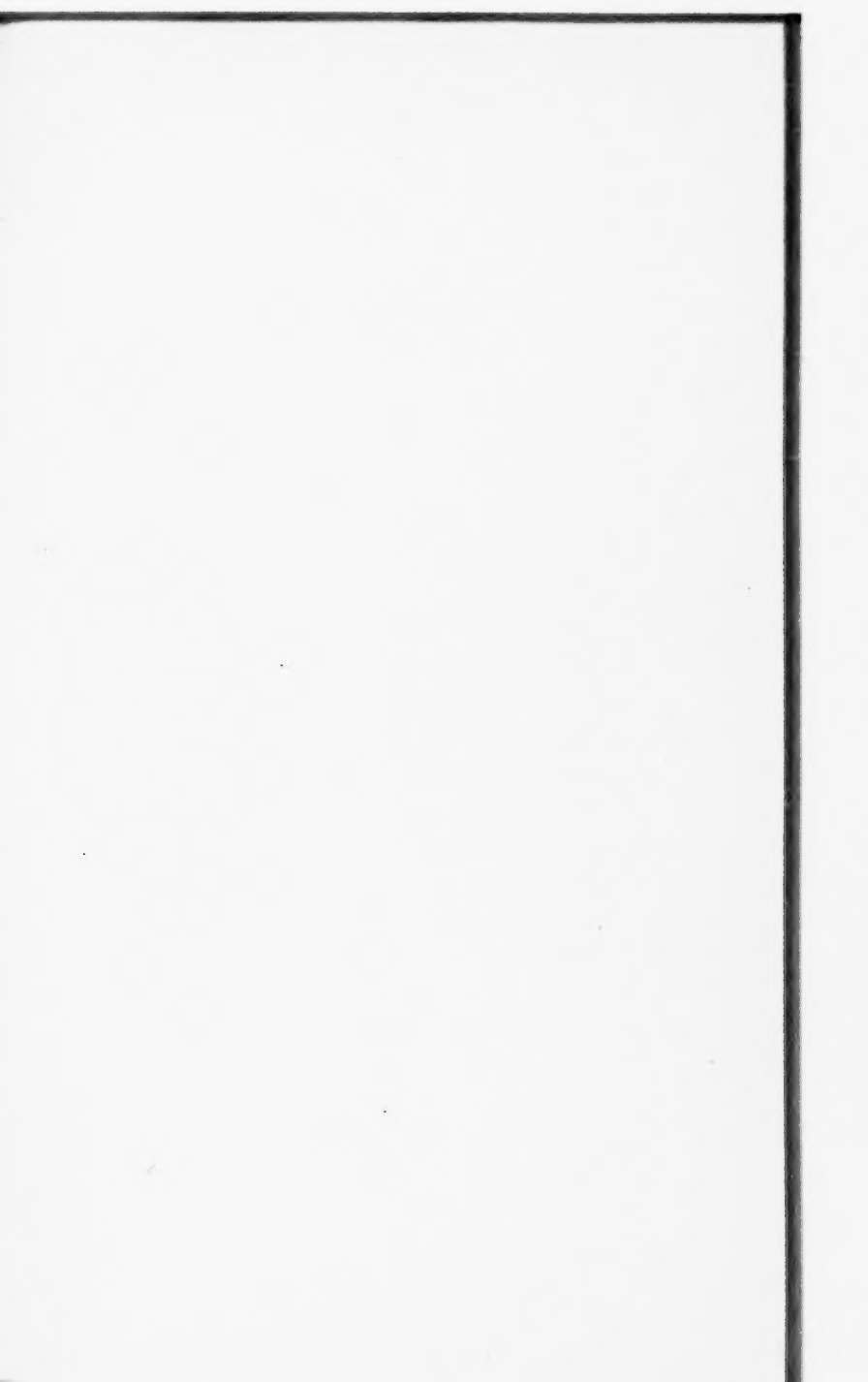
It is evident that during such part of the period of five years extending from August 1, 1900, to August 1, 1905, as the Government occupied the building without any written lease, it was as a tenant holding over after the expiration of the formal written leases. The

alleged demands for possession on the part of the claimants were nothing more than threats for the purpose of securing a higher rental, and never ripened into a denial of the relation of landlord and tenant. This conclusion is made positive by the fact that during the whole period the claimants receipted in full for the rent received, exclusive of the basement, without any protest, except continuous complaint that they were not getting enough rent for the building. It hardly seems necessary to quote or even cite authorities to show that the complaints and threats of the claimants did not amount to a notice to quit. (Taylor's Landlord and Tenant, sec. 483, and cases cited.)

We submit that the record shows that during the three years and one month in question, not expressly covered by the contracts of lease, the Government was a hold-over tenant under the terms of said contracts; and that as the rent has been fully paid the appellants at the rate specified in said contracts, there can therefore be no recovery of additional rent.

We think the Government's defense to both items of the claim is conclusive, and therefore respectfully ask that the judgment of the court below be affirmed.

JOHN Q. THOMPSON,
Assistant Attorney-General.
CHARLES F. KINCHELOE,
Attorney.



HOOE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 13. Argued October 25, 26, 1910.—Decided November 28, 1910.

Congress, proceeding under the Constitution, declares what amount shall be drawn from the Treasury in pursuance of an appropriation. Heads of departments cannot by express or implied contract render the Government liable for an amount in excess of that expressly appropriated by Congress for the subject-matter of the contract.

A claim against the United States for a specific amount of money which is not expressly or by necessary implication authorized by a valid enactment of Congress cannot be said to be founded on the Constitution.

When an officer of the United States takes or uses private property without authority of law he creates no condition under which the Government is liable by reason of its constitutional duty to make compensation. If private property has been taken or used by an officer of the United States without authority of law the remedy is not with the courts but with Congress alone.

A claim for such compensation does not rest on the Constitution, and as an unauthorized act of the officer does not create a claim against the United States, the Court of Claims has no jurisdiction thereof under the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505.

One renting a building to a department of the Government and receiving the entire appropriation for rent for such department has no claim against the Government for any amount in excess of the appropriation, even though he demands more and though he expressly excepts a part of the building from the lease and the department actually occupies the part reserved, nor has the Court of Claims jurisdiction of such a claim as one arising under the provision of the Constitution that private property shall not be taken without compensation.

43 C. Cl. 245, affirmed.

THE facts, which involve the validity of a claim for rent of premises occupied by a department of the United States, the power of an officer of the United States to make contracts in excess of amount appropriated by Congress, and the jurisdiction of the Court of Claims, are stated in the opinion.

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Argument for Appellants.

Mr. L. T. Michener, with whom *Mr. W. W. Dudley* and *Mr. P. G. Michener* were on the brief, for appellants:

The Government of the United States has the absolute power to take private property for public use, just compensation being made. The Secretary of the Interior and the Civil Service Commissioners were and are officers of the United States charged with the performance of official duties. The United States acted by and through them. The actions of the Secretary are not to be regarded as his personal acts but as the acts of the Government. *United States v. Lynah*, 188 U. S. 465, 466.

The House and Senate were fully informed as to what the Secretary of the Interior and the Commission had done.

There is ample legislative authority for all that was done. Act of January 16, 1883, § 4, 22 Stat. 403, makes it the duty of the Secretary to provide suitable and convenient accommodations for the Commission and he could speak and act through his subordinates or through the officials of the Commission. *Parish v. United States*, 100 U. S. 504; *McElrath v. United States*, 102 U. S. 436; *McCollum's Case*, 17 C. Cl. 101, 102.

The United States, by its agents, proceeding under the authority of an act of Congress, took appellants' property for public uses, and it thereby became obligated, by virtue of the Constitution, to make just compensation, and this action lies for the value of the use and occupancy of their property. *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 656; *Great Falls Mfg. Co. v. United States*, 124 U. S. 581, 597; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 324; *United States v. Lynah*, 188 U. S. 445, 460.

Neither the language of the general appropriation acts nor of §§ 3679 and 3732, Rev. Stat., nor of the acts of June 22, 1874, 18 Stat. L. 144, and March 3, 1877, 19 Stat. L. 370, bars recovery. No act of Congress can defeat or nullify the obligation contained in the Fifth Amendment.

149 U. S. 593, 597; *Schillinger v. United States*, 155 U. S. 163; *Bigby v. United States*, 188 U. S. 400, 407, distinguishing *United States v. Russell*, 13 Wall. 623; *United States v. Great Falls Mfg. Co.*, 112 U. S. 645; *The Lynah Case*, 188 U. S. 445; and a decision sustaining this demand would place any executive officer of the Government above Congress and the law in the important function of the expenditure of governmental funds for public purposes; and if there were no other defense, the petition should be dismissed on the ground that a construction of the law and judgment in favor of the appellants would be against public policy. Page on Contracts, § 326; *Randall v. Howard*, 2 Black, 585; *Hannay v. Eve*, 3 Cr. 242; *Woodstock Iron Co. v. Exten. Co.*, 129 U. S. 643; *Gibbs v. Gas Co.*, 130 U. S. 408.

No implied obligation for additional rent could arise as the rate of rent that could be paid for quarters for the Commission was expressly limited by law to the amounts appropriated by Congress and paid the appellants.

Receipt of payment, without protest, is conclusive against a claim for additional pay, and there can be no recovery of additional rent even if it should be held that the tenancy was under implied contract, entirely independent of the express contracts, instead of a hold-over tenancy, under the terms and conditions of the preceding express contracts. *United States v. Childs*, 12 Wall. 232; *Francis v. United States*, 96 U. S. 354, 359; *Murphy v. United States*, 104 U. S. 464; *De Arnaud v. United States*, 151 U. S. 483; *Garlinger v. United States*, 169 U. S. 316, 322; *Chicago, Mil. & St. P. Ry. Co. v. Clark*, 178 U. S. 353, 368; *Newman v. United States*, 81 Fed. Rep. 122.

MR. JUSTICE HARLAN delivered the opinion of the court.

The appellants, plaintiffs below, seek to recover from the United States the sum of \$9,000, the amount, which

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they allege, is due them on account of the occupation and use, by the Civil Service Commission, of certain premises in the city of Washington, District of Columbia.

The finding of fact by the Court of Claims—using largely the words of the finding—may be summarized as follows:

On the tenth day of July, 1900, the Secretary of the Interior, proceeding under the appropriation act for the legislative, executive and judicial expenses of the Government for the fiscal year ending June 30th, 1901 (act of April 17, 1900, 31 Stat. 125, c. 192), made a written agreement with plaintiffs for the leasing and renting to the Government for the use of the Civil Service Commission, of a certain building on E and Eighth streets, in Washington, "except the basement thereof," for the period commencing August 1st, 1900 and ending June 30th, 1901, at the rate of \$333.33¹/₃ per month, or \$4,000 for the year—the right being reserved to the Government to terminate the lease, after thirty days' written notice at the end of any calendar month.

The Commission on August 1st, 1900, took possession and remained in exclusive possession of the building, including its basement, until the bringing of this suit. The amount appropriated by Congress for the rent of offices for the Commission for the year ending June 30th, 1901, was \$4,000, one-twelfth of which was expended for such rent for July, 1900.

On the third of March, 1901, Congress appropriated for the rent of quarters for the Commission the sum of \$4,000 for the fiscal year ending June 30th, 1902. 31 Stat. 1000-1, c. 830, March 3, 1901. The Secretary of the Interior, shortly after the beginning of that year, proposed to the plaintiffs a renewal of the lease for that year. But the plaintiffs expressed their unwillingness "to rent the said building for another year at the rate of \$4,000 per annum," or to rent the entire building, including the basement, then occupied by the Commission,

at a rental less than \$6,000 per annum. Without further action, on either side, "the defendants continued in possession of said building and basement during said year, paying," however, to the plaintiffs \$4,000, the rent specified in the lease for the first year, to wit, \$4,000.

In his estimates submitted for appropriations by Congress for the fiscal year ending June 30th, 1903, the Secretary named \$6,000 "for rent of quarters for the Civil Service Commission." As the general legislative, executive and judicial appropriation bill for that year did not, as it passed the House of Representatives, include that sum, the plaintiffs' agent, in writing, informed the chief clerk of the Interior Department that unless the Senate fixed the rent at \$6,000 the plaintiffs would ask possession of the property at the earliest convenient time. Of this attitude of the plaintiffs the Senate was informed by plaintiffs' agent. He appeared before the House Committee on Appropriations, and by the Secretary of the Interior transmitted the letter of plaintiffs to the Senate Committee on Appropriations. Congress, however, *refused to increase the appropriation to \$6,000*, and for the fiscal year ending June 30th, 1903, appropriated "for rent of buildings for the Department of the Interior, namely, . . . For . . . Civil Service Commission, four thousand dollars." 32 Stat. 162, Pt. 1, c. 594, April 28, 1902. No further action was taken by either party in relation to an increase of rent or the demanding of possession, and the United States continued in possession of the property, including the basement, for that fiscal year, paying rent at the rate of \$4,000 per year. Although the Secretary of the Interior estimated an increase of \$2,000 for quarters of the Civil Service Commission for the fiscal year ending June 30th, 1904, Congress appropriated only \$4,500. 32 Stat. 854, Pt. 1, c. 755, February 25, 1903. In consequence of this increase the Secretary sought to rent from the plaintiffs all the "build-

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ing and premises for the use of the Civil Service Commission for the sum of \$4,500 appropriated," but plaintiffs refused to do that. The Secretary finally, August 18th, 1903, made a lease from claimants for all of said building, "except the basement," for the fiscal year ending June 30th, 1904, at the rate of \$4,500 per year.

For the fiscal year ending June 30th, 1905, Congress, March 18th, 1904, appropriated \$4,500 for the rent of quarters for the Commission. 33 Stat. 85, Pt. 1, c. 716, March 18, 1904. In accordance with that appropriation the Secretary proposed to the plaintiffs, in writing, to renew the lease of August 18th, 1903, for the fiscal year ending June 30th, 1905, at the rate of \$4,500 per annum. The plaintiffs took no action on this proposal, except to write to the Secretary requesting that the basement of the building, which had not been included in either of the leases to the Government, be included "in the lease at the rate of 30 cents per square foot for its floor space." Neither party took any further steps in reference to the renewal of the lease or for an increase of rental for the fiscal year ending June 30th, 1905, and the claimants were paid rent for that year at the rate of \$4,500 as provided by the appropriation and as specified in the lease for the preceding year. A like appropriation of \$4,500 was made for rent of quarters for the Commission for the fiscal year 1906, and that body, without any express renewal of the lease for that year, continued in occupation of the entire building, up to August 1st, 1905, for which the claimants have been paid at the rate of \$4,500 per year.

The Court of Claims further found: "Although the claimants never rented to the Government for the use of the Civil Service Commission, or for any other purpose, that part of the basement of said building not occupied by heating and elevator plants and equipment thereof, yet the Civil Service Commission took possession of this portion of said basement and has continually oc-

cupied and used the same from the 1st day of August, 1900, until the bringing of this action, August 1, 1905;" and in a letter to the Acting Secretary of the Interior, dated November 28, 1904, relative to the matter of a renewal of the Government's lease for the building for that fiscal year, the claimants, among other things, called attention to the fact that the basement of the building was then fully occupied by the Civil Service Commission. The fair rental value of that portion of the basement occupied and used as aforesaid was \$400 per year, and the rental value of the entire building, including the basement, was not less than \$6,000 per year. "During the time that the defendants have occupied and used said building and basement belonging to the claimants, *the claimants have receipted for rent for the same in full*, except for the basement, which has been specially excluded from each of said receipts given by the claimants. With the exception of this exclusion of the basement from said receipts, it does not appear that any other protest was ever made by the claimants that said payments were not in full for the rent legally due to them for said building. The claimants, however, repeatedly insisted that the defendants were not paying enough rent for said building, and on one occasion asked for extra rent for said basement, as heretofore found."

The court below directed the petition to be dismissed and judgment to be entered for the Government. That was accordingly done.

The pleadings and facts indicate that the claim of the appellants is divided into two parts; one, arising out of the occupancy and use by the Civil Service Commission of the building above the basement; the other, for the occupancy and use by that body of the basement.

Let us, at the outset, inquire as to the circumstances under which an officer of the United States, whether the

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Head of a Department or a subordinate, may or may not, by his acts, impose liability upon the Government, in the absence of authority from Congress. The conclusion we have reached upon that inquiry is controlling.

Looking at the statutes in force at the time the transactions here in question occurred, we find that by § 3679 of the Revised Statutes, it was provided that "no department of the Government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract for the future payment of money in excess of such appropriations;" and by § 3732, that "no contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year."

An act of Congress of June 22d, 1874, provided that "hereafter no contract shall be made for the rent of any building or part of any building in Washington, not now in use by the Government, to be used for the purposes of the Government until an appropriation therefor shall have been made in terms by Congress." 18 Stat. 133, 144, c. 388. Again, by the deficiency appropriation act of March 3d, 1877, it was provided that "hereafter no contract shall be made for the rent of any building, or part of any building, to be used for the purposes of the Government in the District of Columbia, until an appropriation therefor shall have been made in terms by Congress, and that this clause be regarded as notice to all contractors or lessors of any such building or any part of building." 19 Stat. 363, 370, c. 106.

The above provisions were all in force when the Civil Service Commission was created. By the act creating that tribunal it was provided that "it shall be the duty

of the Secretary of the Interior to cause suitable and convenient rooms and accommodations to be assigned or provided, and to be furnished, heated, and lighted, at the city of Washington, for carrying on the work of said commission and said examinations, and to cause the necessary stationery and other articles to be supplied, and the necessary printing to be done for said commission." 22 Stat. 403, 405, c. 27, January 16, 1883.

We have seen that the occupancy by the Civil Service Commission of the plaintiffs' building commenced August 1st, 1900. Now, the general appropriation act for the legislative, executive and judicial expenses of the Government, covering the fiscal year ending June 30th, 1901, opened with the clause providing that "the following sums be and the same are hereby, appropriated out of any money in the Treasury not otherwise appropriated, in full compensation for the service of the fiscal year ending June 30th, 1901, for the objects hereinafter expressed, namely. . . . For rent of buildings for the Department of the Interior, namely, . . . Civil Service Commission, \$4,000." 31 Stat. 86, 125, c. 192. Each appropriation act for subsequent fiscal years, covering the whole period of the occupancy by the Commission of the plaintiffs' building, opened with a similar provision. So that the plaintiffs and all others dealing with officers of the Government were distinctly advised as to the amount appropriated by Congress for any specified purpose, and knew, or are to be deemed to have known, that when they received such specified amount for the purpose named, it was intended by Congress to be in full compensation for the service rendered for the Government in that fiscal year. The plaintiffs received before the bringing of this suit the appropriation made by Congress specifically for rent of the building for the Civil Service Commission, during the entire period of the Commission's occupancy and use of it. We recall,

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in this connection, the fact found by the court below, that the claimants' receipted bills recited that the amount paid to them was *in full* for the rent, *as fixed by the appropriation acts of Congress*—excepting always, it is true, the rent for the basement of their building. It is also true that the plaintiffs complained that the amount appropriated was inadequate, but they accepted and receipted for it *as the sum appropriated by Congress for purposes of rent for the Commission*, expecting or hoping, no doubt, that Congress would, in due time, remedy the wrong which, as they insisted, had been and was being done to them in respect both of the building and its basement.

But it is said in this connection that the act of 1883 made it the duty of the Secretary of the Interior to cause suitable rooms to be provided for the Commission, and as the plaintiffs' building was occupied and used by the Commission, for public purposes, with his knowledge and consent, the Government is under a liability to pay the claimants the reasonable value of such occupancy and use. This view cannot be accepted, except upon the theory that during the period in question it was within the power of the Secretary, by contract, in the matter of rent for a building for the Commission, to exceed the sum appropriated by Congress for that purpose. We reject that theory as inconsistent with the acts of Congress and therefore inadmissible. It is for Congress, proceeding under the Constitution, to say what amount may be drawn from the Treasury in pursuance of an appropriation. The statutes above referred to make it plain that the Secretary was without power to make any express contract for rent in excess of the appropriation made by Congress, particularly where, as here, Congress had taken care to say, in respect of each year's rent, that the appropriation shall be in *full* compensation for the specific purpose named in the appropriation act. It is equally

clear that the Secretary could not, by his acts, create a state of things from which, in the absence of legislation on the subject, an implied contract could arise under which the Government would be liable, by reason of its *constitutional* duty, to make just compensation for the use of private property taken for public purposes. In such a case the remedy is with Congress, and not with the courts. If an officer, upon his own responsibility and without the authority of Congress, assumes to bind the Government, by express or implied contract, to pay a sum in excess of that limited by Congress for the purposes of such a contract, the contract is a nullity, so far as the Government is concerned, and no legal obligation arises upon its part to meet its provisions. If the circumstances justify such a course, Congress in its discretion can intervene and do justice to the owner of private property used by officers of the Government in good faith for public purposes, although without direct legislative authority. The plaintiffs' remedy is in that direction.

What we have said is equally applicable to the claim of the plaintiffs for the reasonable value of the use of the basement of the building in question. Granting that the plaintiffs have not been paid for its use such sum as they are justly entitled to have received, we are still confronted with the facts heretofore referred to, that Congress has appropriated, each year of the Commission's occupancy, a specific sum in full for rent of buildings for the use of that body; that it has in effect prohibited the use of the public money, in excess of that sum for rent of buildings for that purpose; and that plaintiffs have already received the entire sums appropriated by Congress for rent. The conclusion necessarily follows that the Government cannot, in this case, be made liable to *suit*, either under an express or implied contract, to pay for the use of plaintiffs' property any amount in excess of the sums appropriated by Congress for that purpose.

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But it is contended by the plaintiffs that their right to recover does not depend upon contract, expressed or implied, but upon the duty, expressly imposed by the Constitution, to make just compensation for private property taken for public use. In support of this view we are reminded that the Tucker act of March 3d, 1887, 24 Stat. 505, c. 359, for the first time, in express words, conferred on the Court of Claims jurisdiction to hear and determine claims against the Government "founded upon the Constitution of the United States." The claims here in question, it is argued, can be rested exclusively on the Constitution, without reference to any statute of the United States, or to any contract arising under an act of Congress. The argument is ingenious but it is unsound. It cannot be said that any claim for a specific amount of money against the United States is founded on the Constitution, unless such claim be either, expressly or by necessary implication, authorized by some valid enactment of Congress. The creation of a Civil Service Commission, providing a building or rooms for its use, and the amount to be paid from time to time by the Government as rent for such building and rooms, are all matters within the complete control of Congress. It is the Constitution which places these matters under the control of Congress. If an officer of the United States assumes, by virtue alone of his office, and *without the authority of Congress*, to take such matters under his control, he will not, in any legal or constitutional sense, represent the United States, and what he does or omits to do, without the authority of the Congress, cannot create a claim against the Government "founded upon the Constitution." It would be a claim having its origin in a violation of the Constitution. The constitutional prohibition against taking private property for public use without just compensation is directed against the Government, and not against individual or public officers

proceeding without the authority of legislative enactment. The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government. So that whether we look at the jurisdiction of the court below, in respect either of claims *alleged to be* founded upon the Constitution or to arise from contract, the plaintiffs cannot maintain this *suit* against the Government; for, they have received the entire sums which Congress appropriated to be paid out of the Treasury on account of rent of buildings or quarters for the Civil Service Commission.

There are other aspects of the case to which the elaborate arguments of counsel have been directed. We deem it unnecessary to notice them in this opinion. Nor do we deem it necessary to follow them in their extended and able discussion of the authorities.

The judgment must be affirmed.

It is so ordered.